# THE SENATE SELECT COMMITTEE ON

# CIVIL JUSTICE REFORM

## A REPORT ON CIVIL JUSTICE IN MICHIGAN

Presented to the Michigan Senate
September 26, 1985

# THE SENATE SELECT COMMITTEE ON CIVIL JUSTICE REFORM

The Senate Select Committee on Civil Justice Reform was created by Senate Resolution No. 204 to study civil justice in Michigan.

The Select Committee consists of seven members of the Senate. The Committee is chaired by Senator Dan DeGrow. The other members are Senator Richard Posthumus, Senator Alan Cropsey, Senator Richard Fessler, Senator Lana Pollack, Senator Basil Brown, and Senator Patrick McCollough.

The Select Committee determined that it should be divided into three subcommittees: a subcommittee on medical malpractice, a subcommittee on governmental liability, and a subcommittee on dram shop.

The subcommittee on medical malpractice is chaired by Senator Alan Cropsey; the subcommittee on governmental liability is chaired by Senator Richard Posthumus; and the subcommittee on dram shop is chaired by Senator Richard Fessler.

Pursuant to Senate Resolution No. 204, the select committee was charged with the responsibility "to address, at a minimum, the issues of structured settlements, statutes of limitation, prejudgment interest, joint and several liability, caps on non-economic damages, and the collateral source rule" and to make a report of its findings and recommendations in writing to the Senate as a whole by October 15, 1985. The resolution directed that the Select Committee be staffed by the Office of the Majority Counsel and other Senate staff members as deemed necessary.

This report is submitted in fulfillment of that responsibility.

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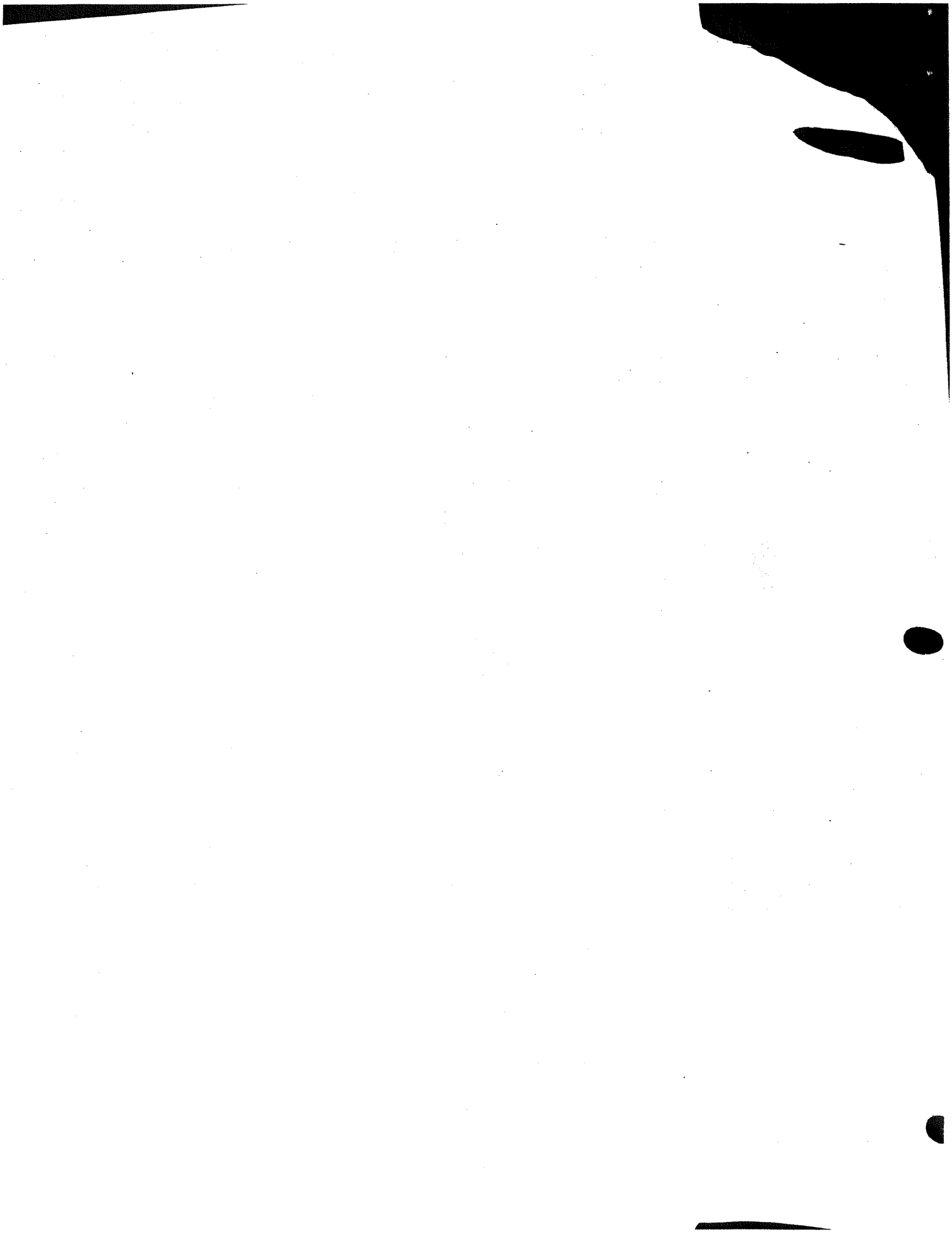

## -- INTRODUCTION --

"I'll sue!" has become such a standard response to controversy that Michigan court dockets are backlogged, lawsuit counts are mushrooming, awards are setting records and the general public is being seriously affected in both tangible and intangible ways. Reduced access to full health care services, higher property taxes, reduced local government services, a battered business climate and cost-prohibitive liability insurance affects every citizen.

Liability has reached epidemic proportions and presents an emergency situation to the Legislature. There is little time for delay in addressing this crisis. Because of this looming consumer problem, the Senate Select Committee on Civil Justice Reform has conducted public hearings around the state of Michigan this summer to evaluate the extent of the liability problem and seek insights from the experts in devising legislative solutions.

The Select Committee consisted of three subcommittees addressing three major aspects of the problem: Medical Malpractice, Governmental Liability, and Dram Shop Liabiity. Though virtually every other business concern -- from day-care centers to horseback riding stables to law practices -- is affected by liability or malpractice costs, doctors, bar owners and civil governments face perhaps the biggest challenges of the day.

Before legislative findings and solutions are presented in this report of the Senate Select Committee on Civil Justice Reform, a description of the problem in its three specific topic areas is presented in this introduction.

MEDICAL MALPRACTICE

At one time it was seen as a simple turf war between doctors and lawyers, but today the medical malpractice liability crisis is accepted as a grave reality. Its effects reach much further than the medical and legal professions, and it is the patient who suffers most. The main concern is that the increase in medical malpractice premiums is endangering the availability and affordability of health care.

Those needing high-risk care, the poor and uninsured, and those living in inner cities and rural areas are the first to suffer. In some areas, according to public testimony, Medicaid does not even pay out enough to cover the malpractice insurance on certain procedures, let alone the procedure itself.

One witness at a Senate public hearing on this issue stated the problem succinctly: "Nobody cares about the doctors and their pocketbook issues. Nobody cares about the insurance companies. Nobody cares about the lawyers. But when you go to the hospital and you need a bone set and the orthopedic surgeon won't touch you because you're too mangled and he's afraid you're going to sue him, then somebody cares."

The crisis has reached that level already. A recent survey conducted by Martin Block of Michigan State University unearthed startling statistics. Among them: In the past five years, 42 percent of Michigan's family physicians have stopped delivering babies or reduced the number of deliveries; 57.6 percent of family physicians stopped or plan to decrease their involvement in surgery; and 57.3 percent have or plan to reduce their level of involvement in intensive care services.

Other related developments are raising the consciousness of patients. Doctors are refusing to perform certain emergency procedures in Flint, and

Oakland County doctors organized a march on the state Capitol. They are concerned about the dramatic increases in the costs of liability insurance.

In 1962, an orthopedic surgeon could obtain $1 million in medical malpractice insurance for approximately $362 a year. Today, that same policy costs an average of $69,000 a year. The cost for just $200,000 worth of coverage averages $48,000 a year, according to the Michigan Osteopathic Academy of Orthopedic Surgeons.

Those costs reflect the upward spiral in medical malpractice lawsuits. The Medical Protective Services Co., which writes malpractice policies, estimates that the frequency of medical malpractice claims has increased from 10 per 100 physicians in 1979 to 25 per 100 in 1984. Surely such an increase cannot be attributed solely or in any large part to decreasing medical skills on the part of Michigan doctors. That company, which insures 4,000 doctors in Michigan, has threatened to leave the state unless the medical malpractice crisis is curbed.

The high-risk categories of medical care are the most seriously affected by the crisis. Those specializing in obstetrics, orthopedic surgery, intensive care techniques, neurosurgery and neo-natal care are among the most dramatically affected.

Said one orthopedic surgeon during testimony: "The media has portrayed doctors to be able to accomplish miracles and miracles are what the patient wants." Anything less is increasingly viewed as malpractice. An increase in the trend will result in fewer and fewer doctors willing to achieve the miracle.

Another concern is that older, more established and more experienced doctors are leaving the state, dropping their specialty or quitting medicine altogether much earlier these days. Their legacy, not only to the patients, but also to medical students and young doctors, is eroding.

Medical malpractice insurance costs have more than doubled in the past five years, and have tripled and quadrupled in some specialties. The average cost for a Michigan doctor is estimated to be at least $52,000 per year, according to the Michigan Hospital Association. A hospital can pay approximately $7,000 to $8,000 per bed! The average premium increase in 1984 alone was 30.7 percent; in 1985, premiums increased 47 percent.

Other states, which have passed laws to limit malpractice cases and awards, like Indiana and Ohio, do not face as extreme a crisis. In 1980, Indiana passed comprehensive legislation putting a total cap on malpractice damages at $500,000 in structured payments, set a two-year statute of limitations and created a pre-screening panel.

The average malpractice premium for an obstetrician in Indiana is $6,000 compared to over $40,000 in Michigan. A general surgeon in Indiana pays about $5,000 a year in malpractice insurance. A Michigan colleague in the same field will pay at least 5.5 times more. It could go higher. In New York, California and Florida, premiums often exceed $80,000 a year.

Today, more and more specialists are taking up general practice and there is a reduced access to specialized services. Another major problem is that doctors are scheduling a superfluous number of tests, just to "be on the safe side." In fact, that so-called "defensive medicine" is estimated to cost patients more then $15 billion a year nationwide.

In Michigan, the Detroit metropolitan area has been hit the hardest by this problem, with Wayne County suffering the most. In fact, a recent story in the Detroit News cited the phenomenon of "carpetbagger" cases -- plaintiffs specifically requesting that their cases be tried in Wayne County because of high awards.

In the tri-county area of Wayne, Oakland and Macomb, the number of medical malpractice suits filed increased from just over 200 in 1970 to nearly

2,200 in 1984. An increase of 1100 percent in 14 years! Perhaps it is for many, as Attorney General Frank Kelley said, an opportunity to participate in the "second Michigan lottery."

It would be unwise, in fact impossible, to deny the extent of this plight which is adversely affecting patient and doctor alike in Michigan. The Senate Select Committee on Civil Justice Reform is ready to introduce legislation to address these problems. Their recommendations will be identified in the main body of this report.

## GOVERNMENT LIABILITY

Few tears are shed about the prospect of "government" being sued for damages. Yet dramatic increases in these suits in recent years are escalating the costs of providing government services today and the taxpayer pays the inevitable price. Governments are being sued for improper road construction and maintenance, injuries on school playgrounds, unlit lamp posts, faulty stoplights, actions of public officials, high-speed police chases, improperly supervised public swimming pools, fires in empty state buildings, and just about every imaginable kind of liability. One major jury award could conceivably match or exceed a small community's annual budget for services.

The state of Michigan itself is a frequent target in the liability crisis. Though the state wins most of the lawsuits in which it is involved, the expense of defending the state in court is rapidly becoming a major factor in the state budget. Lawsuits against the state cost taxpayers over $26 million in settlements and judgments in the last fiscal year -- a third straight record and 33 percent over the previous year.

Michigan has a backlog of 1,400 suits representing claims of $2.4 billion -- about half of the general fund budget. Because of the perception

that governments have "deep pockets," lawsuits at every level have multiplied dramatically.

The most affected area in state government is the Michigan Department of Transportation, which saw the cost of its damage judgments soar from less than $1.4 million in 1979 to $14.9 million in 1983.

According to the Michigan Department of Transportation, their 1984 lawsuit payments were $15.26 million -- 57 percent of the state's total payments to settle or pay off lost lawsuits. Most of the money, including a $6 million judgment to a family involved in a Detroit freeway crash, resulted from suits charging the department with faulty highway maintenance that contributed to accidents. The payments sapped 30 percent of the department's budget for road building and improvements in the last fiscal year! The money does not come from some vague governmental unit. It comes from the taxpayers.

In 1984, MDOT closed 126 cases and opened 161 new ones. Judgments and settlement payouts for MDOT alone have totaled $50 million to date. In the first quarter of 1985 alone, highway liability payouts had exceeded the total amount paid out all year in 1984.

The increase in lawsuits does not correlate with the increasing investment in traffic safety. The Federal Highway Administration consistently ranks Michigan in the top five states nationwide in the percentage of available federal funds for highway safety work. Investments in safety have totaled $679 million the past five years.

In Michigan, local governments, which usually operate on limited budgets, are experiencing unprecedented costs due to their exposure to civil lawsuits related to providing essential government services. These costs are in the form of extremely high damage awards.

Some of the more recent cases against local governmental entities include the following:

A case brought against a Michigan village with a population of 1,558, in which an individual walking on or near the edge of the blacktop of a village road was struck by a vehicle on a rainy morning, was injured and awarded damages of $500,000. The jury found the driver of the car 90 percent negligent and the village 10 percent negligent for failing to mark the edge of the highway adequately. The driver of the car carried only $20,000 in liability insurance. Under current law, the village will be required to pay the $50,000 it is responsible for, plus the $430,000 that is not paid by the driver, even though the village was only 10 percent at fault.

Recently, Wayne County settled on a case due to the possibility of an inordinately high jury award. It involved an auto accident in which a man was killed when his car hit a truck as the truck entered a county road. At the time of the accident, the man was speeding, in a borrowed, uninsured car; he was drunk, with a blood alcohol level twice the legal level of intoxication. The county was found partially negligent because it could have posted "truck crossing" signs on the road.

School districts have also received a rash of lawsuits including the following:

A plaintiff who was injured in the bathroom facilities at an elementary school contended the injury was caused by the removal of the lock from the entrance door of the commode, which allowed the door to swing inward and strike the occupant.

A plaintiff who suffered an eye injury when struck by a tennis ball during a physical education class claimed the building was defective because the school district had failed to rig safety nets between tennis courts to prevent tennis balls from crossing from one court to another.

Governmental employees and officers are also the targets of many lawsuits, including everyone from playground supervisors to crossing guards to police officers. In 1984, the Michigan Supreme Court distinguished between top officials and lower level officers. Judges, legislators and "the highest executive officials" of all government, the Court said, are absolutely immune from tort liability whenever those officials are acting within their authority. However, lower level officers, employees and agents are only immune under certain conditions. Government employees throughout the state are rightfully angered and fearful of this ruling that protects high level officials and leaves the backbone of government, the worker, vulnerable and exposed to liability.

There is certainly a need for those injured due to state, county or local government negligence to receive fair, swift and just remuneration. However, the dramatic trends in the number of lawsuits and the size of judgments and settlements most definitely indicate that something is seriously amiss. Efforts will be made to bring more equity and fairness into the government liability situation to protect not only injured taxpayers, but <u>all</u> taxpayers who rely on government budgets to pay for essential services and safety precautions for all.

## DRAM SHOP LIABILITY

Bar and restaurant owners and proprietors of convention facilities and hotels are suffering grave financial straits at the hands of Michigan's Dram Shop Law, which allows victims of accidents caused by drunk drivers to sue the establishment which served the drinks.

Most of the 23 states which have some form of Dram Shop Law set ceilings on the amount of damages that can be paid. Michigan does not.

The industry, through the Michigan Licensed Beverage Association, says rates in Michigan for Dram Shop insurance are the highest among the 23 states with laws putting liability on the backs of those who sell the drinks. This state is considered to have the toughest Dram Shop laws in the country. Michigan rates are seven times higher than Minnesota, which ranks second, and eleven times higher than New York and New Jersey.

Rates for liability protection under the Dram Shop Act have jumped from less than $1 per $100 worth of drinks sold to about $7 per $100 in sales.

Costs have accelerated enough to drive one premier hotel and restaurant in Traverse City out of the liquor business, and others are expected to follow. During hearings, licensed liquor establishments told of premiums going from $13,000 to $52,000, or from $27,000 to $58,000 in a one-year jump. The Traverse City hotel gave up because its liability costs would have increased from $50,000 to $180,000 for the same coverage in one year.

Michigan regulatory data shows that insurance firms received $2.5 million in premiums for Dram Shop policies and paid out $8.2 million in court awards and legal costs in 1983!

That probably explains why no Michigan-based firms offer liquor liability coverage. In fact, only three firms from around the country offer dram shop insurance to Michigan businesses.

Today, many small businesses are going without protection because of the skyrocketing costs. In fact, it is estimated that approximately 50 to 65 percent of the licensed liquor establishments in Michigan are not insured. That can mean that the establishment that does obtain insurance can "pay twice" -- once in the cost of the coverage and the second time to a victim who sues, knowing which establishment has insurance and which doesn't.

In fact, under current law, a victim can claim that the drinks which caused the drunkenness were served at the insured establishment. As it stands

now, a drinker could go to ten bars and have one drink at each establishment and the first establishment would be just as liable as the last.

Tavern, restaurant, hotel and large-group facilities are falling victim to the state's original good intentions in passing a dram shop act. Though this kind of law makes licensed liquor establishments more responsible about serving drinks and may save lives, the situation has gotten out of hand. The establishments are becoming victims too.

An estimated 600 licensees folded or placed licenses in escrow in the past year with insurance suggested as the major cause. More than 50,000 people are employed by Class C licensees. The impact on jobs, tourism, and small business did not go unnoticed during the fact-finding process.

Courts, in some cases, have awarded extremely exorbitant payouts, as the recent $10.8 million case awarded to the family of a young man who drank at a Pine Knob establishment seems to establish. Courts, in some cases have even given awards to friends and distant relatives of the victims of drunken drivers. In one frequently cited recent Michigan case, the state Court of Appeals said a divorced woman living with her ex-husband was entitled to damages from an establishment where he drank before he was killed in a single-car accident.

Some semblance of fairness and rationality are needed in the Michigan Dram Shop Act to make this an equitable and sensible law for all. The recommendations of the Senate Select Committee on Civil Justice Reform on this key business issue are included in this report.

## REPORT AND RECOMMENDATIONS ON

## MEDICAL MALPRACTICE

## BACKGROUND

The Subcommittee on Medical Malpractice, in conjunction with the Senate Judiciary Committee, has held six meetings around the state to take testimony from any persons or organizations interested in or concerned about the various problems related to medical malpractice. These hearings were held on July 24 in Traverse City, July 26 in Marquette, August 26 in Muskegon, August 27 in Pontiac, September 16 in Saginaw and in Adrian. These meetings were preceded earlier this year by a series of Senate Judiciary Committee public hearings on this topic and by last year's Judiciary Committee hearings examining legislation on medical malpractice, sponsored by Senator McCollough (Senate Bill No. 224).

Further, staff has had extensive contact with representatives of the State Bar, the Michigan Trial Lawyers Association, the Michigan Hospital Association, and the Michigan State Medical Society.

Persons and organizations representing the various interests impacted by the problems regarding medical malpractice have made strong and valid arguments in support or opposition to the recommendations contained in this report. The Committee is sensitive to the rights of victims injured by the negligence of health care providers. These injured parties must be fairly compensated.

Based on the data presented to this Committee, it is clear that Michigan is currently being faced with a malpractice crisis. This crisis is manifested by the large increase in premiums for insurance against malpractice losses. These increases threaten to result in the lack of affordable insurance and even

the very availability of insurance. For example, the three insurance companies that write malpractice policies in Michigan have raised their rates by an average of at least 49 percent last year.

In turn, this poses serious questions about the continued availability of certain medical specialists, such as neurosurgeons, ob/gyns and orthopedic surgeons, and the availability of treatment for certain high-risk patients, such as prenatal care for medically indigent in the inner cities. For example, just this summer orthopedic surgeons and neurosurgeons in Flint have refused to treat certain high-risk patients. Concurrently, ob/gyns in Muskegon have reduced the number of babies they are delivering. A survey by the Michigan State Medical Society found that about two-thirds of Michigan's ob/gyns either have stopped delivering babies, have reduced their obstetrical services, or plan to reduce their services.

Another survey by the Michigan Academy of Family Practice found that Michigan's family physicians are also quitting specialized services because of the threat of lawsuits. Any reduced services would have a disproportionate impact on individuals living outside large cities because over half of the state's family practitioners are from rural areas or small towns.

The increase in medical malpractice premiums can be correlated to a recent explosion in malpractice litigation, exemplified by an increase in the number of claims filed and the increase in the amount of these awards. One Michigan insurance company reports that the frequency of malpractice claims has risen from 10 per 100 physicians in 1979 to 25 per 100 physicians in 1984. In the Metropolitan Detroit tri-county area, the number of malpractice suits filed per year has increased by 1100 percent over the last 14 years. Additionally, the average payment per claim for one insurance company has risen from an average of $10,000 in 1980 to $50,000 per closed claim in 1985.

Yet, it is clear that these increased premium costs are not caused by an insurance "conspiracy." If it were an insurance crisis, how can one explain that claims on a percentage of policyholders is twice as high in Michigan as in Ohio or Indiana. Even more importantly, at the same time Michigan has experienced an increase in both the frequency and severity of malpractice claims, it has also had an increase in the quality of health care services and a decrease in utilization. Unfortunately, for the critics of reform, this refutes the easy answer that it is merely an insurance problem.

Rather, Michigan is found with a real malpractice crisis which is a complex legal, medical and insurance problem.

Based on these considerations, the Committee submits the following recommendations:

1. Pre-Trial Screening Panel

Recommendation

MEDICAL REVIEW PANELS ESTABLISHED BY STATUTE TO DETERMINE IF THE HEALTH CARE PROVIDERS FAILED TO COMPLY WITH THE STANDARD OF CARE. THESE PANELS MUST BE USED AS A CONDITION PRECEDENT TO FILING A LAW SUIT. THE OPINION OF THE PANEL IS ADMISSIBLE IN EVIDENCE. IN ADDITION, THE CLAIMANT OR HEALTH CARE PROVIDER MAY REQUEST THAT A PANEL MEMBER TESTIFY AT THE TRIAL. IF REQUESTED, THE MEMBER MUST APPEAR AND TESTIFY.

Justification

This recommendation is to enact the Indiana pre-screening panel system in Michigan. This proposal will enforce the effectiveness and efficiency of processing medical malpractice cases. The mandating of pre-screening of potential malpractice actions by a panel of doctors will help to weed out frivolous actions and will aid in the prompt settlement and payment of claims when medical malpractice has in fact occurred. It is necessary for this panel to be composed of doctors because only physicians can best determine whether the appropriate standard of care was breached.

In handling malpractice actions, too much time, money and other resources are spent on litigation. One study indicated that legal fees and expenses cost more than is actually paid out to injured parties. For example, in 1984 legal fees and costs composed 52 percent of PICOM's expenditures, while the injured patients' share only amounted to 40%. These high costs result because both plaintiff and the defense attorney wait too long to settle meritorious actions, deal with too many frivolous lawsuits and defenses, and litigate many cases that should not be tried.

This reform should have the impact of eliminating many frivolous actions and defenses. Nationally, 75 percent of all medical malpractice cases are closed without payment. PICOM indicates that about 50 percent of all malpractice cases are dismissed without either a trial or payment of indemnity. Additionally, Medical Protection Insurance Company reports that 13 percent of all malpractice lawsuits are closed without payment and without going to trail. This seems to indicate that a number of frivolous malpractice claims are being filed. However, even in those cases, the defendant must still pay the cost of legal defense. These costs can amount to thousands of dollars per case and have risen by over 70 percent in the first three years. By giving an early indication that no malpractice has occurred, the pre-screening panel would aid in eliminating the costs resulting from the handling of frivolous lawsuits.

On the other hand, it would also speed up payment to the injured party with legitimate claims. By establishing at the outset that negligent treatment had occurred, this system creates an incentive for defendants to settle these cases quickly. This process has demonstrated that ability to speed up the disposition of these cases. For example, in Michigan it currently averages 36 months from the filing of a lawsuit to the final resolution, but in states with a pre-screening panel, the average is only 24 months. In fact, in Indiana, after which act this proposal is modeled, it only takes 18 months -- one half

of Michigan's time. Needless to say, the longer it takes to close a case, the more it will cost in legal fees and costs to handle it. While it is impossible to determine the exact amount that this will save, it is safe to say that it will be significant. The cost reduction can be achieved by merely making the system more effective and without reducing the amount to be paid to the injured party.

2. Statute of Limitation

Recommendation

AMEND THE PRESENT STATUTE OF LIMITATION REGARDING MINORS SO THAT FOR MEDICAL MALPRACTICE CLAIMS THE STATUTE IS TOLLED UNTIL THE CHILD REACHES 6 YEARS OF AGE INSTEAD OF THE CURRENT 18 YEARS.

Justification

This reform is an attempt to get at the problem created by the "long tail" on medical malpractice claims. In insurance terms, the length of time between the accident date and report date is referred to as the "tail." The long tail in medical malpractice is a major difficulty in setting actuarially sound rates.

Under current Michigan law, medical malpractice lawsuits arising out of the birth of a child does not have to be filed until two years after the child's 18th birthday, or in other words, until 20 years after the occurrence. This reform would attempt to shorten that 20-year tail to an 8-year tail. Yet, with the retention of Michigan's 6-month discovery rule, this would not cut off a legitimate claim by a victim for an undiscoverable injury. The rationale behind choosing the age of 6 is that by that time most, if not all, children have gone to school and been given developmental tests. While the parents, especially in the case of an only child, may not be able to recognize that the child is suffering from a disability, the professionals, such as teachers and counselors, who deal with a number of children, should be able to detect a

deficiency. Since the statute would not run out until age 8, this would mean that the child would normally have at least 3 years of schooling before the statute would bar their claim. This should give more than enough time to timely file an action based on an injury.

To demonstrate the extent of the malpractice tail in Michigan, the average malpractice claim is not even reported until 2 years after its occurrence. The Michigan Insurance Bureau states that the average claim is not paid until 5 years after occurrence, although payments may extend many decades beyond the occurrence. The Pennsylvania Report on Medical Malpractice Insurance estimates that half of medical malpractice claims will not be paid until 7 years after occurrence.

The Medical Protective Insurance Company indicates that in 1984 it opened up 33 new cases that were more than 10 years after the service date, of which 16 were before 1970. They claim that they just can't have these 15-year-old cases coming in because they cannot accurately price their risks. This long tail causes malpractice insurance companies to maintain large asset and reserve balances to cover claims that may arise 20 years down the road. It is this large reserve for these future unfiled claims that lead to the controversy over whether insurance companies are ripping off the doctors.

The experience of the Pacific Indemnity Company presents a good example to comprehend the length and breadth of the medical malpractice payment tail in Michigan. In 1977, Pacific Indemnity ceased writing malpractice policies in Michigan. In the 6 years since that time, they have paid out over $39 million in direct claims without any additional premium income. Of this amount, claim payments for 1983 and 1984 exceeded $11 million, and an estimated $7 million in claims remain unsettled. This dramatically indicates that large reserves are a necessity for medical malpractice insurers.

This reform, by cutting 12 years off the malpractice tail for the claim of minors, should help to significantly alleviate this problem. Allowing the insurance companies to get a better handle on liability expenses should result in the setting of actuarially sound rates. In turn, this should eliminate both the need for and the controversy surrounding the large insurance reserve accounts.

3. Limitation on Non-Economic Damages

Recommendation

A. ENACT A $250,000 LIMIT ON THE AWARD OF NON-ECONOMIC LOSSES.

B. REQUIRE THE FACT FINDER TO ITEMIZE THE AMOUNTS AWARDED TO THE CLAIMANT INTO PAST AND FUTURE DAMAGES; AND INTO ECONOMIC AND NON-ECONOMIC DAMAGES.

Justification

A substantial portion of the verdicts being returned in medical malpractice cases are for non-economic losses, such as, pain and suffering. There is a common belief that these awards for non-economic damages are the primary source of the overly generous and arbitrary malpractice payments. This is because these claims are not easily amenable to accurate or even approximate monetary assessment. As a result the translation of these losses into dollar equivalence is a very subjective process.

There is some data suggesting that juries are compensating medical malpractice injuries at a higher level than the same injury caused under different circumstances. For example, a Rand Corporation study indicated that malpractice awards for a comparable injury were larger than judgments for dram shop cases and automobile accidents.

A cap on permissible "non-economic" damages will help reduce the incidence of unrealistically high malpractice jury awards, yet at the same time it would protect the right of the injured party to recover the full amount of economic

losses, including lost wages and medical expenses. A number of states, most notably California and Indiana, have enacted limits on non-economic damages in malpractice actions. A 1982 Rand Institute for Civil Justice report found that states which have adopted caps have experienced an average drop of 19 percent in the severity of awards within two years of enactment. This might lead to a stabilization of the medical malpractice insurance premiums. In turn, this could lead to lower premiums and reduced health care cost to consumers and would guarantee the availability of medical services to all consumers.

While these caps are susceptible to constitutional challenge based on equal protection grounds, these limits have been upheld in a number of states, most notably the trend-setting state of California. Its Supreme Court has upheld a $250,000 cap on non-economic damages stating that this limitation was rationally related to a legitimate state interest by reducing malpractice costs for medical care providers and assuring the viability of the professional liability system. Furthermore, the Ninth Circuit of the United States Court of Appeals has also upheld the constitutionality of the California non-economic loss cap in a recent July 1985 decision. The Court of Appeals held that the California statute was supported by a rational basis and thus, did not violate the equal protection clause of the United States Constitution. This is because the reduction of medical malpractice insurance premiums is a legitimate state purpose, and it is reasonable to believe that placing a ceiling on non-economic damage would help reduce these premiums.

Accordingly, based on these rulings from a trend-setting state, there is a high probability that a cap on non-economic damages in medical malpractice cases will be held to be constitutional. Unquestionably, this type of cap will have a significant impact in reducing the amount of malpractice payments without denying the injured party's reimbursement for out-of-pocket losses.

## 4. Joint and Several Liability

### Recommendation

A. ABOLISH JOINT AND SEVERAL LIABILITY FOR DEFENDANTS WHOSE NEGLIGENCE IS LESS THAN 50 PERCENT.

B. REQUIRE THE FINDER OF FACT TO APPPORTION RELATIVE DEGREE OF FAULT BETWEEN PLAINTIFFS AND DEFENDANTS AND ALSO ASSIGN A PERCENTAGE OF LIABILITY AMONG THE VARIOUS DEFENDANTS.

### Justification

The abolition of joint and several liability and the institution of liability on the basis of comparative fault is the emerging national trend in liability law. The Supreme Court of Michigan took the first step toward this system of comparative fault in 1979 by adopting comparative negligence between the plaintiff and one or more defendants. Limiting liability to the degree of fault attributable to a particular defendant is the logical and fair extension of this comparative approach.

With a system of comparative negligence, strict joint and several liability is no longer justified.

Joint and several liability dictates that when a person is injured by the conduct of several people, the liability is indivisible; i.e., the injured person can collect the entire judgment from any of the wrongdoers. The doctrine has evolved over the centuries by the courts. Historically, jointly liable tortfeasors were those persons who by common design, acted together to injure the plaintiff. The modern concept of joint and several liability attributes liability to any defendant whose conduct has contributed to a single indivisible injury -- a much broader concept.

The question of modifying joint and several liability has arisen upon the adoption of comparative negligence. Until 1979, the doctrine of contributory negligence prevented a plaintiff who was negligent in any degrees from recovering from a defendant unless the defendant committed gross negligence.

This was a harsh doctrine that made marginally negligent plaintiffs bear the entire burden of his or her loss or injury.

In 1979, the Michigan Supreme Court adopted the doctrine of pure comparative negligence in place of contributory negligence. Under this doctrine, the plaintiffs damages must be reduced to the extent of the plaintiff's own negligence, but the action is not barred by that negligence.

The doctrine of joint and several liability, therefore, historically operated in the context of contributory negligence where the plaintiff was legally without fault. The doctrine was intended to make whole an innocent plaintiff and place the risk of one of the several defendants being insolvent on the other wrongdoing defendants.

With the system of comparative negligence, fault is required to be apportioned between the plaintiff and defendants. Therefore, the concept that fault or the cause of the injury is indivisible does not apply. Also, it is not necessarily the case that the plaintiff is innocent. On the contrary, the plaintiff may be more negligent than the defendants.

This proposed modified joint and several rule is an attempt to balance the equities based on the concept of relative degrees of fault. It is an attempt to solve the perceived problem that defendants with deep pockets are paying a disproportionate share of the verdict even though their degree of fault is relatively minor.

If the solvent defendant is responsible for one half or more of the negligence, then he or she should still be liable for the entire amount of damages. However, if the defendant is responsible for less than half of all defendant negligence, then that defendant would only be liable for his or her own degree of fault. This represents an attempt to assign liability amount co-defendants based on their degree of fault instead of the size of their pocketbooks.

Under this proposed scheme, a defendant who is only 5 percent negligent would not have to pay for 90 percent of the damages, but rather would only have to pay for his or her own degree of fault. Basic fairness requires that a defendant who did not cause the majority of the damage should not have to pay for the entire loss. This is a step towards basing each defendant's liability exposure on the degree of responsibility. Yet, it continues to assign the risk of uncollectibility to the defendant who is responsible for the majority of the negligence.

This proposal will have a major impact on the liability exposure of hospitals, who are normally the malpractice defendant with the deepest pocket. For example, Henry Ford Hospital estimates that $565 from every patient's bill goes to cover malpractice insurance. This amount has increased by 200 percent over the last two years.

Fourteen states have recently limited or abolished joint and several liability. This particular type of revision was enacted by statute in Iowa, 1984 Act, Sections 668.1-668.3, 619.17.

The requirement that the trier of fact apportion relative degrees of fault and assign percentages of liability is in accord with current standard jury instructions developed for use in the courts of this state since the adoption of comparative negligence.

5. Collateral Source

Recommendation

ELIMINATION OF THE COLLATERAL SOURCE RULE. THE COURT WOULD REDUCE ANY JUDGMENT BY AN AMOUNT EQUAL TO COLLATERAL SOURCE PAYMENTS, LESS PREMIUM PAID AND THE VALUE OF THE EMPLOYEE FRINGE BENEFIT PACKAGE. BUT IN NO EVENT MAY THE JUDGMENT BE REDUCED BY MORE THAN 50 PERCENT.

Justification

The collateral source rule prohibits the introduction into evidence of the fact that a plaintiff has already been compensated or reimbursed for

injuries from a source other than the defendant (private health insurance, workers compensation and the like). It seems improper for the plaintiff to be twice reimbursed by retaining collateral payments as well as receiving full payment for the same item from the defendant.

The proposed modification of this rule is necessary to eliminate this "double recovery" by the plaintiff. Since the underlying purpose of the tort system is to make the plaintiff whole, it is unfair for them to be twice compensated for the same item. The proper measure of the liability of the defendant should be the extent to which the plaintiff suffered uncompensated pecuniary, out-of-pocket losses.

The elimination of this rule would have a significant impact on both the amount of medical malpractice awards and insurance premiums without denying the plaintiff any uncompensated losses. A study by the American Bar Association found that in a typical state which has broadly repealed the collateral source rule, it would appear that malpractice awards would be reduced by about 20 percent. A Rand Corporation study is consistent with this finding, stating that a ban on this double recovery reduces court awards by 18 percent.

6. Structured Awards

Recommendation

A. TO STATUTORILY AUTHORIZE THE PERIODIC PAYMENTS OF CIVIL DAMAGE AWARDS. (MCR 3.104; MCLA 600.6201)

B. ALLOW EITHER PARTY TO APPLY TO THE COURT FOR A PERIODIC PAYMENT ORDER.

C. TO MANDATE THE COURT TO ENTER AN ORDER THAT DAMAGES FOR NON-ECONOMIC LOSSES IN EXCESS OF $100,000 BE PAID BY PERIODIC PAYMENTS.

D. TO REQUIRE THAT PAYMENTS OF DAMAGES FOR FUTURE LOST WAGES BE PAID IN THE YEAR IN WHICH THE WAGES WOULD HAVE BEEN PAID.

E. TO REQUIRE THAT FUTURE MEDICAL BILLS BE PAID AS THEY ARE INCURRED.

## Justification

Under our current tort system, most tort judgments are paid in a lump sum payment. This practice often leads to overpayments not intended by the fact-finder. For example, an injured party is awarded compensation based on an assumption of future lost wages and medical expenses over the remainder of his/her life expectancy. If the injured party dies before that time, then the net result is a substantial payment to the heirs who are unintended beneficiaries of the tort system.

Additionally, it is these lump sum payments which some attribute as a major cause of high malpractice insurance premiums. Under current insurance practice, companies try to estimate the losses that will arise from that insurance year, but they have no way of predicting exactly when a lump sum payment will arise. Accordingly, they must create large reserve funds to assure that money is available when a large lump sum award is made. A structured settlement process will better allow the companies to adequately reserve for these large claims. Arrangements are possible under periodic payments to provide significant benefits to the victim which can be funded by an insurer at a significantly lower cost to the insurer with reasonable security to the plaintiff. For example, in a recent Michigan case an injured party who lost both kidneys due to medical malpractice received $1.2 million is guaranteed benefits (with a potential life expectancy benefits of $2.7 million) for an actual cash payout of $300,334 by the insurer.

It just makes sense to require that payments for future medical expenses be paid as they occur and for lost wages or earning capacity to be compensated in the years that they would have been earned.

The use of structured payment also helps the injured party by assuring that money will always be available for its intended purposes. It also protects the injured party from the injudicious use of lump sum settlement by

a guardian, resulting in the exhaustion of the funds before the needs of the injured party have been met. For example, in New York just two years ago, a plaintiff received a multi-million dollar settlement and today all the money has already been spent.

In conclusion, periodic payments constitute a sensible, flexible, and cost-effective method of compensating those with long-term and substantial disabilities.

## 7. Frivolous Actions

### Recommendation

AUTHORIZE THE FULL RECOVERY OF COSTS AND REASONABLE ATTORNEY FEES INCURRED BY THE PREVAILING PARTY FROM THE OTHER PARTY, OR THEIR ATTORNEY IF THE COURT FINDS THAT A CIVIL ACTION OR DEFENSE WAS FRIVOLOUS OR SOLELY FOR HARASSMENT (SB 735 of 1984 and MCR 2.1141(E)).

### Justification

Nationally, 75 percent of all medical malpractice claims are closed without payment. This would tend to indicate that a number of frivolous malpractice claims are being filed. For example, PICOM indicates that about 50 percent of all malpractice cases are dismissed without either a trial or payment of indemnity. However, even in these cases, the defendant must still pay the cost of legal defense, which amounts to thousands of dollars per case and which has risen by over 70 percent in the last three years.

While under present Michigan Court Rule, MCR 2.1141(E), there is a provision to assess reasonable expenses, including attorney fees, against a party who presents unwarranted allegations or defenses, the rule is rarely invoked. Currently there is a perception that there is little to lose by filing a frivolous lawsuit since litigation costs are rarely, if ever, awarded. There is a belief that the increase in the number of cases being filed is due to a rise in frivolous actions or defenses. Some have estimated that this runs as high as 5 to 10 percent of all civil cases. In any regard,

the number of civil actions have so clogged the court's dockets that it takes 5 years to get to trial in Wayne County, up to 3 years in other metropolitan counties, and 1 1/2 years in outstate counties.

The deterrence of frivolous or harassing legal actions will help ease the burden on the courts and help relieve the clogging of court dockets. Historically, the American legal system has never favored a general rule allowing recovery of costs to the prevailing party in a private lawsuit. Our system of jurisprudence has an unspoken public policy of encouraging free access to the courts for all citizens. Accordingly, limiting the recovery to only frivolous and harassing actions is not a great departure from past practice. It certainly does not even approach the British rule whereby the prevailing party receives reimbursement in every case. It would be an expansion of the "Equal Access to Justice" Act, Public Act 197 of 1984, which allows recovery of cost by a prevailing party from a state agency in a frivolous lawsuit.

The recommendation to statutorily authorize the payment of costs will encourage parties to oppose frivolous actions. In the past, they may have simply settled because it would cost more to litigate the case, and even if they won, they could not recover costs. This proposal will deter frivolous and harassing legal actions. The possibility of being held liable for the other party's legal expenses will cause litigants to weigh the merits of the lawsuit or the defense before filing a pleading. Since the trial judge will make the determination in awarding cost, the good-faith party has nothing to worry about. If the claim or defense has substance, it will be exhibited at trial and the judge will not tax expenses. While everyone has the right to resort to the courts to protect their legal rights, nobody has the right to abuse the court system for frivolous or harassing actions.

This type of provision would be particularly appropriate to deter and punish frivolous malpractice actions, especially if the proposed pre-trial screening panel were enacted. It could be extremely difficult in certain circumstances for a plaintiff to argue that an action was not frivolous if the panel found that the medical standard of care had not been breached. Conversely, it would be extremely difficult for a defendant to argue that a defense was not frivolous if the panel found that the standard of care had been breached.

8. Pre-Judgment Interest

Recommendation

A. TIE THE RATE OF PRE-JUDGMENT INTEREST TO THE RATE OF 5-YEAR T-BILLS. THE AMOUNT WOULD BE ADJUSTED SEMIANNUALLY.

B. ELIMINATE THE ACCRUING OF PRE-JUDGMENT INTEREST FOR THE FIRST SIX MONTHS AFTER SERVICE OF THE LAWSUIT ON THE DEFENDANT.

C. IF A REASONABLE SETTLEMENT OFFER IS MADE WITHIN THE FIRST SIX MONTHS, BUT NOT ACCEPTED UNTIL SOME TIME AFTER THE EXPIRATION OF THOSE SIX MONTHS, THEN THE PRE-JUDGMENT INTEREST WOULD START TO RUN FROM THE FIRST DAY OF THE SEVENTH MONTH. A REASONABLE SETTLEMENT OFFER IS ONE THAT IS AT LEAST 90 PERCENT OF THE AMOUNT ACTUALLY RECEIVED BY THE PLAINTIFFS BY EITHER A SETTLEMENT OR JUDGMENT. TO QUALIFY FOR THIS BENEFIT, THE DEFENDANT WOULD HAVE TO FILE A FORMAL OFFER OF SETTLEMENT WITH THE COURT.

D. IF A REASONABLE SETTLEMENT OFFER IS NOT MADE WITHIN THE FIRST SIX MONTHS AFTER SERVICE, THEN THE PRE-JUDGMENT INTEREST SHALL START TO RUN RETROACTIVELY TO THE DATE OF FILING.

Justification

Michigan currently assesses pre-judgment interest on any tort-based judgment at the rate of 12 percent per year, compounded annually from the date of filing of the complaint. The rationale behind this interest is twofold. The first is to encourage settlement by the defendant by charging interest and the second is to keep the defendant from being unjustly enriched by reaping the investment income on the amount of damages eventually owed to the plaintiff.

Historically the rate of pre-judgment interest was 6 percent. However, during the hyper-inflation of the late 70's, this rate was deemed too low. After all, if the defendant can earn interest income in double digits, as was possible at that time, why should they settle quickly for the amount of damages plus 6 percent. Accordingly, this rate was raised to 12 percent in 1980. But now that interest rates have dramatically fallen, this 12 percent rate is too high.

There is also a perception that it has become counter productive, especially when dealing with the relatively large malpractice awards, because some plaintiffs and plaintiff's attorneys are refusing to accept reasonable settlement offers so that they can continue to earn the higher 12 percent interest income. Clearly, they could not currently do as well investing an award in the financial market.

As a result, it is suggested that we reform Michigan's pre-judgment interest rate and tie it to a floating indicator so that it truly reflects the investment market. This would give both the plaintiff and defendant the same incentive to settle cases.

Additionally, there is a need in malpractice cases to encourage quick settlements of claims. As discussed in the section on Pre-Trial Screening Panels, litigation costs make up over 50 percent of the cost of malpractice insurer's expenditures. The longer it takes to resolve a case, the more it will cost. Any reform that will speed up the process of resolving these claims will result in a significant cost savings without denying the injured party any just compensation.

Therefore, this proposal, which eliminated pre-judgment interest for the first six months after filing if there is a legitimate written settlement offer by the defendant, is designed to speed up settlement of the case. But if there is no offer or no legitimate settlement offer, then the defendant

will have to pay pre-judgment interest from the date of filing. On the other hand, the plaintiff will have reduced incentive to turn down a reasonable settlement because the pre-judgment interest would not continue to run.

9. Expert Witness

Recommendation

RESTRICTIONS ON EXPERT TESTIMONY THAT SETS STANDARDS FOR QUALIFICATION OF EXPERT WITNESSES. WITH RESPECT TO AN ACTION AGAINST A NON-SPECIALIST, THERE MUST BE A REQUIREMENT THAT THE WITNESS MUST DEVOTE NOT LESS THAN 75 PERCENT OF HIS/HER PROFESSIONAL TIME TO THE ACTIVE CLINICAL PRACTICE OF MEDICINE OR TEACHING. IF THE ACTION IS AGAINST A SPECIALIST, THE WITNESS MUST ALSO BE REQUIRED TO SPECIALIZE IN THE SAME AREA OF MEDICINE AS THE DEFENDANT AND MUST DEVOTE NOT LESS THAN 75 PERCENT OF HIS/HER TIME TO ACTIVE CLINICAL PRACTICE OR TEACHING IN THE SAME SPECIALTY AS THE DEFENDANT.

Justification

This reform is necessary to regulate the use of "professional expert" witnesses in Michigan malpractice cases.

Testimony of expert witnesses is normally required to establish a cause of action for malpractice. Expert testimony is necessary to establish both the appropriate standard of care and the breach of that standard. There is currently no specific requirement for an expert witness to devote a specific percentage of time in the actual practice of medicine or teaching, or when testifying against a specialist that the expert actually practices or teaches in that specialty. Instead, a physician-witness is qualified to testify as an expert in Michigan, even though he/she does not practice in Michigan and is not of the same specialty, based on a mere showing of an acceptable background and a familiarity with the nature of the medical condition involved in the case. As a practical matter, in many courts merely a license to practice medicine is needed to become a medical expert on an issue.

This has given rise to a group of national professional witnesses who travel the country routinely testifying for plaintiffs in malpractice actions.

These "hired guns" advertise extensively in professional journals and compete fiercely with each other for the expert witness business. For many, testifying is a full-time occupation and they rarely actually engage in the practice of medicine. There is a perception that these so-called expert witnesses will testify to whatever someone pays the to testify about.

This proposal is designed to make sure that expert witnesses actually practice or teach medicine. In other words, to make sure that experts will have firsthand practical expertise in the subject matter about which they are testifying. In particular, with the malpractice crisis facing high-risk specialists, such as neurosurgeons, orthopedic surgeons and ob/gyns, this reform is necessary to insure that in malpractice suits against specialists the expert witnesses actually practice in that same specialty. This will protect the integrity of our judicial system by requiring real experts instead of "hired guns."

10. Hospital and Doctor Record Keeping

Recommendation

A. AMEND THE PENAL CODE TO MAKE IT A CRIMINAL MISDEMEANOR PUNISHABLE BY IMPRISONMENT FOR UP TO ONE YEAR AND A MAXIMUM FINE OF $5,000, OR BOTH, FOR A HEALTH CARE PROVIDER TO HAVE WILLFULLY AND WRONGFULLY CHANGED, DESTROYED, ALTERED, OR TAMPERED WITH MEDICAL RECORDS OR CHARTS.

B. AMEND THE PENAL CODE TO MAKE IT A CRIMINAL MISDEMEANOR PUNISHABLE BY IMPRISONMENT FOR UP TO ONE YEAR AND A MAXIMUM FINE OF $5,000, OR BOTH, FOR A HEALTH CARE PROVIDER TO INTENTIONALLY, WILLFULLY, OR RECKLESSLY PROVIDE MISLEADING OR INACCURATE INFORMATION TO A PATIENT REGARDING THE DIAGNOSIS, TREATMENT OR CAUSE OF A PATIENT'S CONDITION, OR TO PLACE SUCH INFORMATION IN A PATIENT'S MEDICAL RECORD OR HOSPITAL CHART.

C. REQUIRE HOSPITALS TO MAINTAIN ACCURATE AND COMPLETE PATIENT RECORDS AND DOCUMENTATION, AND TO TAKE PRECAUTIONS SO THAT SUCH RECORDS ARE NOT CHANGED, DESTROYED, ALTERED OR TAMPERED. THE FAILURE OF THE HOSPITAL TO COMPLY MAY RESULT IN A CIVIL FINE OF $5,000.

## Justification

This reform is needed to prevent the concealment of a medical malpractice occurrence. The Committee is aware of a number of documented cases when medical records have been destroyed or altered, and inaccurate information has been put on charts in an attempt to hide the fact that malpractice had happened. There is a concern that this practice might be more widespread than has so far been reported.

This practice of destroying or changing records and/or telling patients inaccurate information or placing false information in medical charts is nothing more than an active cover-up of negligence. Accordingly, it should be subject to serious criminal sanctions and be the basis for license revocation.

After all, if the Legislature is going to enact measures to correct perceived inequities in the malpractice tort system, it has every right to expect the truth from the health care providers. These types of criminal sanctions are needed to punish dishonest behavior by some providers.

Finally, by acting as a significant deterrent, it will insure that injured parties will have access to accurate information about their medical treatment.

## 11. Peer Review and Licensing Actions

### Recommendations

A. PROVIDE IMMUNITY FROM CIVIL SUITS FOR MEMBERS OF THE LICENSING BOARD.

B. PROHIBIT A COURT OR ADMINISTRATIVE AGENCY FROM STAYING A SANCTION ORDERED BY THE BOARD OF MEDICINE OR THE BOARD OF OSTEOPATHIC MEDICINE AND SURGERY.

C. CLARIFY THAT THE DETERMINATION OF SANCTIONS IS THE RESPONSIBILITY OF THE LICENSING BOARD. IF THE COURT HELD A SANCTION ILLEGAL, THEN IT MUST STATE THE REASON ON THE RECORD AND REMAND THE ACTION TO THE LICENSING BOARD FOR FURTHER ACTION.

D. EXTEND TO THREE YEARS THE TIME FRAME THAT AN INDIVIDUAL WHOSE LICENSE HAD BEEN REVOKED WOULD HAVE TO WAIT BEFORE APPLYING FOR REINSTATEMENT.

E. A LICENSEE CONVICTED FOR CRIMINAL SEXUAL CONDUCT OR A LICENSEE VIOLATING THE GOOD MORAL CHARACTER STANDARD COULD BE SUBJECTED TO BOARD IMPOSED SANCTIONS INCLUDING PROBATION, LIMITATION, DENIAL, SUSPENSION OR REVOCATION OF A LICENSE.

F. ENABLE THE LICENSING BOARD TO IMPOSE FINES AND ORDER RESTITUTION AS PART OF ITS DISCIPLINARY ACTIONS.

G. REQUIRE HOSPITALS, HMO's AND PPO's TO PROVIDE INFORMATION TO LICENSING BOARDS WHEN THEY BRING DISCIPLINARY ACTION AGAINST A PHYSICIAN RESULTING IN A CHANGE IN THEIR EMPLOYMENT STATUS OR PRIVILEGES.

H. GRANT IMMUNITY FROM CIVIL AND CRIMINAL LIABILITY TO THOSE ASSISTING A LICENSING BOARD AND FOR MAKING A REPORT TO A BOARD. THIS IMMUNITY WOULD EXTEND TO A STATE OR COUNTY HEALTH PROFESSIONAL ORGANIZATION AND TO A COMMITTEE OR OFFICER OR EMPLOYEE OF SUCH ORGANIZATION.

I. CLARIFY THAT AN INDIVIDUAL WHOSE LICENSE HAS BEEN SUSPENDED OR REVOKED COULD NOT BE ISSUED A TEMPORARY LICENSE.

J. EMPOWER THE LICENSING BOARD TO TAKE DISCIPLINARY SANCTIONS EVEN AFTER THE PERSON'S LICENSE HAS EXPIRED OR BEEN SURRENDERED.

K. AUTOMATICALLY SUSPEND OR REVOKE THE CONTROLLED SUBSTANCES LICENSE WHEN A LICENSE TO PRACTICE WAS SUSPENDED OR VOIDED.

L. MANDATE AUTOMATIC LICENSURE REVIEW SUBSEQUENT TO BOARD VERIFICATION OF THREE SUCCESSFUL MALPRACTICE CLAIMS REQUIRING TOTAL COMPENSATION IN EXCESS OF $200,000 IN ANY 10-YEAR PERIOD.

M. REQUIRE THE LICENSING BOARD TO INVESTIGATE ALLEGATIONS ON A PRIORITY BASIS.

N. MANDATE AUTOMATIC LICENSURE REVOCATION FOR A HEALTH CARE PROVIDER WHO HAS BEEN FOUND IN A JUDICIAL PROCEEDING TO HAVE WRONGFULLY CHANGED, DESTROYED, ALTERED OR TAMPERED WITH MEDICAL RECORDS OR CHARTS.

O. MANDATE AUTOMATIC LICENSURE REVOCATION FOR A HEALTH CARE PROVIDER WHO HAS BEEN FOUND IN A JUDICIAL PROCEEDING TO HAVE INTENTIONALLY, WILLFULLY, OR RECKLESSLY PROVIDES MISLEADING OR INACCURATE INFORMATION TO A PATIENT REGARDING THE DIAGNOSIS, TREATMENT OR CAUSE OF THE PATIENT'S CONDITION, OR TO PLACE SUCH FALSE INFORMATION IN A PATIENT'S MEDICAL RECORD OR HOSPITAL CHART.

P. ASSESS A SURCHARGE AGAINST THE LICENSEES TO FUND THE DISCIPLINARY ACTIVITIES AND INVESTIGATIONS IMPOSED BY THESE PROPOSALS.

## Justification

Clearly, the number one cause for medical malpractice awards is negligence by the health care provider. There are "bad doctors" and there is statistical evidence that they cause a disproportionate share of the

malpractice. A study in Pennsylvania of multiple malpractice offenders indicates that 1 percent of all physicians were responsible for over 25 percent of all CAT Fund loss payments. When this is broken down by specialty, then 10 percent of all neurosurgeons account for 47 percent of all loss payments, and 4 percent of all orthopedic surgeons account for 45 percent of the losses. This figure closely correlates with a Florida study which found that multiple offenders were responsible for 24.4 percent of claim frequency against physicians.

Yet the efforts at weeding out these bad doctors through licensing actions appear to be woefully inadequate. In the entire country, only 1,381 of the nation's 430,000 doctors were disciplined last year. In 1983, there were only 1,154 doctors who had their licenses suspended or revoked, or who were subjected to other significant actions. This represents disciplinary action against only one out of every 252 doctors involved in malpractice settlements.

In addition to incompetent doctors, the American Medical Association estimates that 10,000 doctors in the United States are alcoholics and 4,000 are drug addicts. This means that at any given time 5 to 15 percent of the nation's physicians are incompetent or impaired and should not be treating patients. Despite this evidence, very few incompetent or impaired doctors are actually disciplined. For example, in 1982 of the 252 doctors nationwide who lost their licenses, in only 11 cases was it based on incompetency or malpractice.

A recent study in the Detroit Free Press indicated that Michigan's disciplinary system has been ineffective in removing the license of even "bad doctors." In 1984 Michigan took disciplinary action at the rate of only 1-8 per 1000 doctors. This ranks 38th in the country. In Michigan, in 1982-1983, only 12 MD's and 10 DO's lost their licenses, and in 1983-1984, the numbers

were 18 and 6 respectively. More astonishing is that available data indicates that no administrative complaints resulted from malpractice suits in 1984 and only three resulted from malpractice suits in 1985. Yet medical incompetence can be terribly expensive in terms of the victim and in terms of the malpractice premiums.

## REPORT AND RECOMMENDATIONS ON

## GOVERNMENTAL LIABILITY

### BACKGROUND

The subcommittee on governmental liability held two day-long public hearings on July 31 and August 13 to take testimony from any persons or organizations interested in or concerned about the various problems related to governmental liability. Those hearings were preceded earlier this year by a series of public hearings and Senate Judiciary Committee hearings conducted to examine legislation on governmental liability sponsored by Senator Alan Cropsey (Senate Bills 327 and 328).

Persons and organizations representing the various interests impacted by the problems regarding the extent of liability of governmental units have made strong and valid arguments in support or opposition to the recommendations contained in this report. The subcommittee is sensitive to, and concerned for, the rights of victims of wrongdoing on the part of governmental units. The victims of such wrongdoing should be fairly compensated.

However, it is clear that units of government, both state and local, are experiencing greatly increased costs for liability insurance and greatly increased exposure to liability for damages related to providing essential government services, particularly highways and roads. The taxpayers of this state are entitled to receive those essential services in the most cost-effective manner.

It is clear that those increased costs are not caused by an insurance industry "conspiracy" as has been feared by some. This is true for several reasons: first, the area of municipal liability insurance in this state is

dominated by self-insurance and insurance pools, not commercial insurance; and second, testimony has indicated that increased insurance premiums are related to increased risk and other general economic factors affecting the insurance industry. The reforms recommended in this report are addressed to causes of increased costs that are common to both commercial insurers and self-insureds. And while it is possible that insurance costs may continue to increase notwithstanding these reforms because of general economic factors affecting the insurance industry, these reforms should moderate the rate of increase of insurance premiums and exposure to risk of liability without materially affecting the rights of victims of government wrongdoing.

The most fundamental policy that emerged from the varied testimony was that the report should not represent a move towards increased sovereign immunity for governmental units. Rather, the report should address the extent to which governmental units are to be liable in situations where they are not now immune. However, the subcommittee does feel the potential liability of governmental employees has been greatly increased following the Michigan Supreme Court decision in Ross v Consumers Power. This potential liability threatens to subject the governmental agencies to increased liability by indemnity and to inhibit employees in effectively executing their lawful duties.

Based on these considerations, the committee submits the following recommendations:

1. Pre-judgment Interest

Recommendation

REQUIRE THE STATE OF MICHIGAN TO PAY PRE-JUDGMENT INTEREST AS REQUIRED ON ALL OTHER TORT-BASED JUDGMENTS.

## Justification

Michigan currently does not assess pre-judgment interest in actions brought against the State of Michigan pursuant to the Court of Claims Act.

This provision was enacted as part of the legislative scheme intended to limit the liability of the state and to preserve the scarce resources of the State. The purpose of pre-judgment interest, on the other hand, is to encourage settlement by the defendant by charging interest from the date a complaint is filed and to prevent the defendant from being unjustly enriched by reaping the investment income on the amount of damages eventually awarded to the plaintiff.

Testimony suggested that the state failed to settle claims that result in large judgments after trial. It is suggested that these claims are not settled because the lack of pre-judgment interest creates a disincentive to settle. Because of the increasing amount of these resulting judgments and the increasing cost of defending litigation at trial, the original purposes of the exemption from pre-judgment interest granted to the state; i.e., limiting the liability of the state and preserving the scarce resources of the state, would more effectively be accomplished by encouraging the state to settle claims expeditiously. In addition, the plaintiff will fairly benefit by the payment of pre-judgment interest.

Because the recommendation is for the state to pay pre-judgment interest are required on all other tort-based judgments, the state would pay the interest based on the recommendation in the report on medical malpractice. That recommendation is as follows:

1. TIE THE RATE OF PRE-JUDGMENT INTEREST TO THE RATE OF 5-YEAR T-BILLS. THE AMOUNT WOULD BE ADJUSTED SEMIANNUALLY.

2. ELIMINATE THE ACCRUING OF PRE-JUDGMENT INTEREST FOR THE FIRST SIX MONTHS AFTER SERVICE OF THE LAWSUIT ON THE DEFENDANT.

3. IF A REASONABLE SETTLEMENT OFFER IS MADE WITHIN THE FIRST SIX MONTHS, BUT NOT ACCEPTED UNTIL SOME TIME AFTER THE EXPIRATION OF THOSE SIX

MONTHS, THEN THE PRE-JUDGMENT INTEREST WOULD START TO RUN FROM THE FIRST DAY OF THE SEVENTH MONTH. A REASONABLE SETTLEMENT OFFER IS ONE THAT IS AT LEAST 90 PERCENT OF THE AMOUNT ACTUALLY RECEIVED BY THE PLAINTIFFS BY EITHER A SETTLEMENT OR JUDGMENT. TO QUALIFY FOR THIS BENEFIT, THE DEFENDANT WOULD HAVE TO FILE A FORMAL OFFER OF SETTLEMENT WITH THE COURT.

4. IF A REASONABLE SETTLEMENT OFFER IS NOT MADE WITHIN THE FIRST SIX MONTHS AFTER SERVICE, THEN THE PRE-JUDGMENT INTEREST SHALL START TO RUN RETROACTIVELY TO THE DATE OF FILING.

## 2. Joint and Several Liability

### Recommendation

A. ABOLISH JOINT AND SEVERAL LIABILITY FOR DEFENDANTS WHOSE NEGLIGENCE IS LESS THAN 50 PERCENT.

B. REQUIRE THE FINDER OF FACT TO APPORTION RELATIVE DEGREE OF FAULT BETWEEN PLAINTIFFS AND DEFENDANTS AND ALSO ASSIGN A PERCENTAGE OF LIABILITY AMONG THE VARIOUS DEFENDANTS.

### Justification

The abolition of joint and several liability and the institution of liability on the basis of comparative fault, when a governmental unit is less than 50 percent at fault, brings the system of governmental liability into accord with the emerging national trend in liability law.

Joint and several liability dictates that when a person is injured by the conduct of several people, the liability is indivisible; i.e., the injured person can collect the entire judgment from any of the wrongdoers. The doctrine has evolved over the centuries by the courts. Historically, jointly liable tortfeasors were those persons who by common design, acted together to injure the plaintiff. The modern concept of joint and several liability attributes liability to any defendant whose conduct has contributed to a single indivisible injury -- a much broader concept.

The question of modifying joint and several liability has arisen upon the adoption of comparative negligence. Until 1979, the doctrine of contributory negligence prevented a plaintiff who was negligent in any degrees from

recovering from a defendant unless the defendant committed gross negligence. This was a harsh doctrine that made marginally negligent plaintiffs bear the entire burden of his or her loss or injury.

In 1979, the Michigan Supreme Court adopted the doctrine of pure comparative negligence in place of contributory negligence. Under this doctrine, the plaintiffs damages must be reduced to the extent of the plaintiff's own negligence, but the action is not barred by that negligence.

The doctrine of joint and several liability, therefore, historically operated in the context of contributory negligence where the plaintiff was legally without fault. The doctrine was intended to make whole an innocent plaintiff and place the risk of one of the several defendants being insolvent on the other wrongdoing defendants.

With the system of comparative negligence, fault is required to be apportioned between the plaintiff and defendants. Therefore, the concept that fault or the cause of the injury is indivisible does not apply. Also, it is not necessarily the case that the plaintiff is innocent. On the contrary, the plaintiff may be more negligent than the defendants.

With a system of comparative negligence, joint and several liability is no longer justifiable. It is unfair to burden a defendant governmental unit with the responsibility for full payment of damages when that governmental unit was less than 50 percent responsible for the loss. It is unfair to assign liability among co-defendants based on the ability to pay rather than their degree of fault. Limiting liability to the degree of fault attributable to defendants less than 50 percent at fault is a logical and fair extension of comparative negligence.

Regardless of the perceived severity of the fiscal impact on governmental units, basic fairness requires that each defendant's liability exposure be based on the degree of fault for the plaintiff's injuries.

Fourteen states have recently limited or abolished joint and several liability.

The requirement that the trier of fact apportion relative degrees of fault and assign percentages of liability is in accord with current standard jury instructions developed for use in the courts of this state since the adoption of comparative negligence.

3. Collateral Source

Recommendation

ELIMINATION OF THE COLLATERAL SOURCE RULE. THE COURT WOULD REDUCE ANY JUDGMENT BY AN AMOUNT EQUAL TO COLLATERAL SOURCE PAYMENTS, LESS PREMIUM PAID AND THE VALUE OF THE EMPLOYEE FRINGE BENEFIT PACKAGE. BUT IN NO EVENT MAY THE JUDGMENT BE REDUCED BY MORE THAN 50 PERCENT.

Justification

The collateral source rule prohibits the introduction into evidence of the fact that a plaintiff has already been compensated or reimbursed for injuries from a source other than the defendant such as private health insurance, workers compensation, government benefits, and the like. It is unfair for a governmental unit to be required to pay for costs that have been fully compensated by the government, no-fault benefits or another source. While the plaintiff may feel entitled to be twice reimbursed by retaining collateral payments as well as receiving full payment for the same item from the defendant governmental unit, this expectation should not be realized to the detriment of those relying on essential government services.

The proposed modification of this rule is only intended to eliminate this "double recovery" by the plaintiff. Since the underlying purpose of the tort system is to make the plaintiff whole, it is not necessary for plaintiff to be twice compensated for the same loss. And while an appropriate goal of the tort system is to prevent defendants from benefiting by their wrongdoing, this should not apply to governmental units. Punishing a governmental unit only

punishes innocent taxpayers. Double recovery for plaintiffs should not be financed by diminished government services. The proper measure of the liability of a defendant governmental unit should be the extent to which the plaintiff has suffered uncompensated losses.

The elimination of this rule would have a significant impact on limiting the fiscal impact of liability on governmental units without denying the plaintiff compensation for his or her losses.

4. Frivolous Actions

Recommendation

AUTHORIZE THE FULL RECOVERY OF COSTS AND REASONABLE ATTORNEY FEES INCURRED BY THE PREVAILING PARTY FROM THE OTHER PARTY, OR THEIR ATTORNEY IF THE COURT FINDS THAT A CIVIL ACTION OR DEFENSE WAS FRIVOLOUS OR SOLELY FOR HARASSMENT (SB 735 of 1984 and MCR 2.1141(E)).

Justification

Many cases are filed against governmental units merely because they are "collectible." Even if these cases are dismissed without a trial or settlement, the defendant must still pay the cost of legal defense, which may amount to thousands of dollars per case.

While under present Michigan Court Rule, MCR 2.1141(E), there is a provision to assess reasonable expenses, including attorney fees, against a party who presents unwarranted allegations or defenses, the rule is rarely invoked. Currently there seems to be a perception that there is little to lose by filing a frivolous lawsuit since litigation costs are rarely, if ever, awarded. There is a belief that the increase in the number of cases being filed is due to a rise in frivolous actions or defenses. Some have estimated that this runs as high as 5 to 10 percent of all civil cases. In any regard, the number of civil actions have so clogged the court's dockets that it takes 5 years to get to trial in Wayne County, up to 3 years in other metropolitan counties, and 1 1/2 years in outstate counties.

Some have suggested that Michigan adopt the British system of discouraging frivolous litigation. Historically, however, the American legal system has never favored a general rule allowing recovery of costs to the prevailing party in a private lawsuit. Our system of jurisprudence has an unspoken public policy of encouraging free access to the courts for all citizens. The British system, however, requires the losing party to pay litigation costs to the prevailing party.

The recommendation to statutorily authorize the payment of costs will encourage parties to oppose frivolous actions. In the past, they may have simply settled because it would cost more to litigate the case, and even if they won, they could not recover costs. This suggestion will deter frivolous and harassing legal actions. The possibility of being held liable for the other party's legal expenses will cause litigants to weigh the merits of the lawsuit or the defense before filing a pleading. Since the trial judge will make the determination in awarding cost, the good-faith party has nothing to worry about. If the claim or defense has substance, it will be exhibited at trial and the judge will not tax expenses. While everyone has the right to resort to the courts to protect their legal rights, nobody has the right to abuse the court system for frivolous or harassing actions.

The deterrence of frivolous or harassing legal actions will help ease the burden on the courts and help relieve the clogging of court dockets. Limiting the recovery to only frivolous and harassing actions is not a great departure from past practice. It certainly does not even approach the British rule whereby the prevailing party receives reimbursement in every case. It would be an expansion of the "Equal Access to Justice" Act, Public Act 197 of 1984, which allows recovery of cost by a prevailing party from a state agency in a frivolous lawsuit.

## 5. Limitation on Non-Economic Damages

### Recommendation

A. ENACT A $250,000 LIMIT ON THE AWARD OF NON-ECONOMIC LOSSES.

B. REQUIRE THE FACT FINDER TO ITEMIZE THE AMOUNTS AWARDED TO THE CLAIMANT INTO PAST AND FUTURE DAMAGES; AND INTO ECONOMIC AND NON-ECONOMIC DAMAGES.

### Justification

A substantial portion of the verdicts being returned in governmental liability cases are for non-economic losses, such as, pain and suffering. There is a common belief that these awards for non-economic damages are the primary source of the overly generous and arbitrary payments. This is because these claims are not easily amenable to accurate or even approximate monetary assessment. As a result the translation of these losses into dollar equivalence is a very subjective and emotional process for the finder of fact.

A cap on permissible "non-economic" damages will help reduce the incidence of unrealistic jury awards, yet at the same time protect the right of the injured party to recover the full amount of economic losses, including lost wages and medical expenses, is protected. A number of states have enacted limits on non-economic damages in certain actions, including medical malpractice. Based on experiences in those states, such limits should lead to a stabilization of governmental liability insurance premiums and self-insurance. In turn, this would guarantee that taxpayers receive the full benefit of their tax dollars in the form of increased government services.

While these caps may be susceptible to constitutional challenge based on equal protection grounds, these limits have been upheld in a number of states on medical malpractice claims, most notably in the trend-setting state of California. Its Supreme Court has upheld a $250,000 cap on non-economic damages stating that this limitation was rationally related to a legitimate state interest by reducing malpractice costs for medical care providers and

assuring the viability of the professional liability system. Furthermore, the Ninth Circuit of the United States Court of Appeals has also upheld the constitutionality of the California non-economic loss cap in a recent July, 1985 decision. The Court of Appeals held that the California statute was supported by a rational basis and thus, did not violate the equal protection clause of the United States Constitution. This is because the reduction of medical malpractice insurance premiums is a legitimate state purpose and it is reasonable to believe that placing a ceiling on non-economic damage would help reduce these premiums.

Accordingly, based on these rulings from a trend-setting state, there is a high probability that a cap on non-economic damages in governmental liability cases also will be held to be constitutional. Unquestionably, this type of cap will have a significant impact in reducing the impact on the ability of governmental units to deliver essential government services without denying the injured party's reimbursement for out-of-pocket losses.

6. Definitions

Recommendation

ADOPT THE DEFINITION OF "GOVERNMENTAL FUNCTION" FROM THE DECISION IN ROSS V CONSUMERS POWER.

Justification

The Michigan Supreme Court in the Ross decision has defined a governmental function as "an activity which is expressly or impliedly mandated or authorized by constitution, statute or other law." This new definition eliminates the confusion that has existed over which test or definition should be applied to determine whether a governmental agency is immune. To insure that this long sought after consistency remains, this court-made definition should be enacted as part of the governmental immunity statute.

As a general rule, then, governmental agencies will be immune from tort liability when engaging in or discharging a "governmental function" unless the activity is proprietary in nature or it falls within one of the exceptions set forth in the governmental immunity act.

## 7. Governmental Officials, Employees, and Agents

### Recommendation

LOWER LEVEL OFFICIALS, EMPLOYEES AND AGENTS OF GOVERNMENTAL UNITS SHOULD BE IMMUNE WHEN ENGAGED IN A GOVERNMENTAL FUNCTION AND ACTING WITHIN THE SCOPE OF THEIR AUTHORITY, PROVIDING THE EMPLOYEES' ACTIONS ARE NOT GROSSLY NEGLIGENT.

### Justification

The decision in Ross v Consumers Power has greatly increased the potential liability of lower level officials, employees and agents of governmental units. Such persons are immune only when acting during the course of employment; acting, or reasonably believe they are acting, within the scope of their authority; acting in good faith; and performing "discretionary-operational" acts as opposed to "ministerial-operational" acts.

This potential exposure to liability for low level governmental employees creates several problems. First, the governmental agency will eventually be liable because it will have to insure and indemnify its employees who are acting within the scope of their jobs.

Second, it will result in considerably more complex and trouble prone labor relations and contract negotiations as employee and employer bargain over indemnity.

Third, the potential liability will likely have a chilling effect on the government employee as he or she attempts to carry out assigned functions.

Fourth, there is no clear justification for immunizing high level officials and not low level officials. In addition, there is no clear justification for immunizing the agency and not the employee.

8. Structured Awards

Recommendation

A. TO STATUTORILY AUTHORIZE THE PERIODIC PAYMENTS OF CIVIL DAMAGE AWARDS. (MCR 3.104; MCLA 600.6201)

B. ALLOW EITHER PARTY TO APPLY TO THE COURT FOR A PERIODIC PAYMENT ORDER.

C. TO MANDATE THE COURT TO ENTER AN ORDER THAT DAMAGES FOR NON-ECONOMIC AWARDS IN EXCESS OF $100,000 BE PAID BY PERIODIC PAYMENTS.

D. TO REQUIRE THAT PAYMENTS OF DAMAGES FOR FUTURE LOST WAGES BE PAID IN THE YEAR IN WHICH THE WAGES WOULD HAVE BEEN PAID.

E. TO REQUIRE THAT FUTURE MEDICAL BILLS BE PAID AS THEY ARE INCURRED.

Justification

Under our current tort system, most tort judgments are paid in a lump sum payment. This practice often leads to overpayments not intended by the fact-finder. For example, an injured party is awarded compensation based on an assumption of future lost wages and medical expenses over the remainder of his or her life expectancy. If the injured party dies before that time, then the net result is a substantial payment to the heirs who are unintended beneficiaries of the tort system.

Additionally, it is these lump sum payments which some attribute as a major cause of the increasing fiscal impact on governmental units, particularly smaller units. Under current insurance practice, companies try to predict the losses that will arise from that insurance year, but they have no way of predicting exactly when a lump sum payment will arise. Accordingly, they must create large reserve funds to assure that money is available when a large lump sum award is made. A structured settlement process will better allow the companies to adequately reserve for these large claims. Arrangements are possible under periodic payments to provide significant benefits to the victim which can be funded by an insurer with reasonable security to the plaintiff at a significantly lower cost to the insurer.

It just makes sense to require that payments for future medical expenses be paid as they occur and for lost wages or earning capacity to be compensated in the years that they would have been earned.

The use of structured payment also helps the injured party by assuring that money will always be available for its intended purposes. It also protects the injured party from the injudicious use of lump sum settlement by a guardian, resulting in the exhaustion of the funds before the needs of the injured party have been met. For example, in New York just two years ago, a plaintiff received a multi-million dollar settlement and today all the money has already been spent.

In conclusion, periodic payments constitute a sensible, flexible, and cost-effective method of compensating those with long-term and substantial disabilities.

## REPORT AND RECOMMENDATIONS ON

## DRAM SHOP LIABILITY

### BACKGROUND

The enactment of Michigan's dram shop law constituted a determination by the Legislature of Michigan that the injurious consequences of intoxication are not just the fault of the intoxicated person, but are also the fault of any licensed liquor establishment that facilitates the person's intoxication. Reversing previous common law, the Legislature determined that in the case of alcohol consumption, the consumer is not entirely responsible for his or her own actions. The server of the alcohol, if a licensee of the state, is also responsible.

The dram shop law was designed to serve three primary purposes. 1) It was to be compensatory, as a secondary source of recovery for innocent victims of accidents caused by intoxicated persons, providing an additional source of compensation in the event the wrongful intoxicated person could not satisfy a judgment. 2) It was to be preventive, acting as a deterrent to the assistance or encouragement of intoxication and the accidents intoxicated persons cause, stimulating the responsible service of alcohol by licensees. 3) To a lesser extent, it was to be penal, punishing for-profit servers of alcoholic beverages for what the Legislature perceived to be the wrongful act of contributing to the further intoxication of persons who are already a danger to themselves and others.

This system of legislated liability, and its three primary purposes, is now in a state of crisis. Due to the enormous increase in the number of litigated cases, the enormous increase in the size of jury awards and settlements stimulated by the fear of such jury awards, and the vast expansion

in the scope of liability by Michigan's judiciary, the cost of insuring against dram shop liability has become prohibitively high. This has resulted not just in the inability of many licensees to afford liability insurance, but also in the inability of most licensees to even acquire such insurance.

Testimony has revealed that as many as 65 percent of Michigan's bars and taverns are currently without liability insurance, and that this percentage is likely to rise if the Legislature fails to take remedial action. In short, the dram shop liability system is breaking down. At the same time, injuries due to accidents caused by intoxicated persons remain a major societal problem.

The dram shop system of liability must be preserved. Driving while impaired by alcohol is an unacceptable form of social behavior. The state has the right and obligation to take steps to prevent such behavior and to provide remedial compensation when such behavior results in injuries to innocent victims.

The Committee has determined that legislated reforms must be implemented in Michigan's dram shop liability system in order to preserve the system. Regardless of which of the three primary purposes one is most concerned with -- compensatory, preventive, or penal -- that purpose cannot be satisfied if the basic financial foundation for the dram shop system collapses. The Committee is particularly cognizant of the failure of the preventive purpose. Dram shop liability as currently practiced has simply failed to make acceptable strides toward the prevention of intoxication-related accidents.

The recommendations of the Senate Committee as they relate to dram shop liability are aimed at achieving two chief goals: 1) That the system of dram shop liability remain active and solvent so that it can fairly and reliably provide adequate compensation to innocent victims, and 2) That the

system of dram shop liability play a positive and constructive role in the prevention of intoxication-related accidents.

Based on these considerations, the Committee submits the following recommendations:

1. Joint and Several Liability

Recommendation

A. ABOLISH JOINT AND SEVERAL LIABILITY IN THOSE CASES WHERE THE DEFENDANT IS LESS THAN 50 PERCENT AT FAULT.

A. REQUIRE THE FINDER OF FACT TO APPORTION RELATIVE DEGREE OF FAULT BETWEEN PLAINTIFFS AND DEFENDANTS AND ALSO ASSIGN A PERCENTAGE OF LIABILITY AMONG THE VARIOUS DEFENDANTS.

Justification

The abolition of joint and several liability and the institution of liability on the basis of comparative fault, when a licensee is less than 50 percent at fault, brings the system of dram shop responsibility into accord with the national trend in liability law. The Supreme Court of Michigan took the first step toward this system of comparative fault in 1979 by adopting comparative negligence between the plaintiff and one or more defendants. Limiting liability to the degree of fault attributable to a particular defendant is the logical and fair extension of this comparative approach.

This is particularly true in the area of dram shop liability. The imposition of liability on licensees who sell and serve alcoholic beverages was designed to provide a secondary source of compensation for innocent victims of accidents caused by intoxicated patrons of these licensees. In practice, however, these licensees have become the primary source of compensation. Joint and several liability, by making every defendant, regardless of his or her degree of fault, liable for every other defendant's fault, has made the licensee primarily liable.

The dram shop law was created in recognition of the belief that the intoxicated tortfeasor is not alone responsible for his action. The licensee that facilitated the intoxication is also responsible. The problem with joint and several liability is that it has made the licensee almost exclusively responsible. Joint and several liability has in many instances absolved the primary wrongdoer, the intoxicated person, from all responsibility and placed the full responsibility onto the licensee. This is a corruption of the basic premise behind the institution of dram shop liability. It is liability on the basis of ability to pay, not on the basis of fault. It is patently unfair.

If a licensee is held to share responsibility for the injuries suffered by an innocent third party because the licensee sold or served alcohol to a visibly intoxicated person, then the licensee should be liable for that share of the responsibility, and that share alone.

The requirement that the trier of fact determine the share of responsibility by the licensee and assign percentages of liability accordingly is in accord with current standard jury instructions developed for use in the courts of this state since the adoption of comparative negligence.

## 2. Collateral Source

### Recommendation

ELIMINATION OF THE COLLATERAL SOURCE RULE. THE COURT WOULD REDUCE ANY JUDGMENT BY AN AMOUNT EQUAL TO COLLATERAL SOURCE PAYMENTS, LESS PREMIUM PAID AND THE VALUE OF THE EMPLOYEE FRINGE BENEFIT PACKAGE. BUT IN NO EVENT MAY THE JUDGMENT BE REDUCED MORE THAN 50 PERCENT.

### Justification

The collateral source rule prohibits the introduction into evidence of the fact that a plaintiff has already been compensated or reimbursed for injuries from a source other than the defendant, such as private health insurance, workers' compensation, government benefits and the like. Under this rule, a plaintiff may recover up to double for his injuries.

The Committee finds such double recovery inconsistent with the dram shop liability purposes of compensation and prevention. If a victim has received full compensation for his or her injuries, then a "windfall" added award is unnecessary to satisfy the compensation purpose. Likewise, full double compensation is a more severe imposition of liability than is necessary to achieve the preventive goals of the law. A retention of 50 percent additional liability should be sufficient to satisfy the preventive purpose of the law. (Although the penal purpose behind the law may be satisfied by the insistence on double payment, the Committee rejects this unrealistic burden on the dram shop system.)

The elimination of the collateral source rule should have a significant impact on both the size of dram shop liability awards and the size of insurance premiums without denying a plaintiff any uncompensated losses. Such a reduction in liability awards and premiums is essential if the dram shop system is to be saved from financial collapse.

3. Structured Awards

Recommendation

A. TO STATUTORILY AUTHORIZE THE PERIODIC PAYMENTS OF CIVIL DAMAGE AWARDS. (MCR 3.104; MCLA 600.6201)

B. ALLOW EITHER PARTY TO APPLY TO THE COURT FOR A PERIODIC PAYMENT ORDER.

C. TO MANDATE THE COURT TO ENTER AN ORDER THAT DAMAGES FOR NON-ECONOMIC LOSSES IN EXCESS OF $100,000 BE PAID BY PERIODIC PAYMENTS.

D. TO REQUIRE THAT PAYMENTS OF DAMAGES FOR FUTURE LOST WAGES BE PAID IN THE YEAR IN WHICH THE WAGES WOULD HAVE BEEN PAID.

E. TO REQUIRE THAT FUTURE MEDICAL BILLS BE PAID AS THEY ARE INCURRED.

Justification

Under the current system of dram shop liability, most judgments are paid in a lump sum payment. This practice leads to unnecessary uncertainty in the

decisions of the fact-finder. For example, an injured party may be awarded compensation based on an assumption of future lost wages and medical expenses over the remainder of his or her life expectancy. If the injured party dies before that time, then the net result is a substantial payment to the heirs who are unintended beneficiaries of the original judgment.

Such uncertainty and unintended overcompensation can be avoided by permitting structured payments of compensation. A structured payment process would allow licensees and their insurers to more adequately reserve for a large claim. Arrangements are possible under periodic payments which can be funded by an insurer with a reasonable security to the plaintiff, and at a significantly lower cost to the insurer. This also helps the injured party by assuring that money will always be available for its intended purposes. From a practical perspective, a structured award protects the injured party from the injudicious use of lump sum settlements.

Structured settlements assure a more accurate relationship between liability awards and actual damages to the injured party, while contributing to the availability of insurance to permit the payment of the awards.

## 4. Pre-judgment Interest

### Recommendation

A. TIE THE RATE OF PRE-JUDGMENT INTEREST TO THE RATE OF FIVE-YEAR T-BILLS. THE AMOUNT WOULD BE ADJUSTED SEMIANNUALLY.

B. ELIMINATE THE ACCRUING OF PRE-JUDGMENT INTEREST FOR THE FIRST SIX MONTHS AFTER SERVICE OF THE LAWSUIT ON THE DEFENDANT.

C. IF A REASONABLE SETTLEMENT OFFER IS MADE WITHIN THE FIRST SIX MONTHS, BUT NOT ACCEPTED UNTIL SOME TIME AFTER THE EXPIRATION OF THOSE SIX MONTHS, THEN THE PRE-JUDGMENT INTEREST WOULD START TO RUN FROM THE FIRST DAY OF THE SEVENTH MONTH. A REASONABLE SETTLEMENT OFFER IS ONE THAT IS AT LEAST 90 PERCENT OF THE AMOUNT ACTUALLY RECEIVED BY THE PLAINTIFFS BY EITHER A SETTLEMENT OR JUDGMENT. TO QUALIFY FOR THIS BENEFIT, THE DEFENDANT WOULD HAVE TO FILE A FORMAL OFFER OF SETTLEMENT WITH THE COURT.

D. IF A REASONABLE SETTLEMENT OFFER IS NOT MADE WITHIN THE FIRST SIX MONTHS AFTER SERVICE, THEN THE PRE-JUDGMENT INTEREST SHALL START TO RUN RETROACTIVELY TO THE DATE OF FILING.

Justification

Michigan currently assesses pre-judgment interest on any tort-based judgment at the rate of 12 percent per year, compounded annually from the date of filing of the complaint. The rationale behind this interest is twofold. The first is to encourage settlement by the defendant by charging interest and the second is to keep the defendant from being unjustly enriched by reaping the investment income on the amount of damages eventually owed to the plaintiff.

Neither rationale is currently justified in the dram shop liability setting. The unpredictability caused by ever-expanding court imposition of liability and by the enormous size of jury awards is already coercing most licensees into very large settlements. Those licensees that fail to settle claims do so not to delay resolution of the case, but to attempt to avoid the unreasonable "deep pocket" demands made by many plaintiffs in the current atmosphere of very high awards.

The second rationale is also unjustified. Most licensees do not have the financial flexibility to invest in high-return portfolios. For most licensees dependent on liquid assets, 12 percent is too high an interest figure. It acts as a penalty.

As a result, it is suggested that we reform Michigan's pre-judgment interest rate and tie it to a floating indicator so that it truly reflects the investment market. This would give both the plaintiff and defendant the same incentive to settle cases, and not act as a penalty for exercising legal rights.

The other proposed interest reform, eliminating the accrual of pre-judgment interest for six months, encourages settlement when proposals to

settle are reasonable and genuinely aimed at resolving the case. It looks directly at the willingness of the licensee to settle by looking directly at the offer of the licensee. With these reforms, the twofold rationale for pre-judgment interest will once again be satisfied.

5. Limitation on Non-Economic Damages

Recommendation

A. ENACT A $250,000 LIMIT ON THE AWARD OF NON-ECONOMIC LOSSES.

B. REQUIRE THE FACT FINDER TO ITEMIZE THE AMOUNTS AWARDED TO THE CLAIMANT INTO PAST AND FUTURE DAMAGES, AND INTO ECONOMIC AND NON-ECONOMIC DAMAGES.

Justification

The crisis in dram shop liability caused by the enormous increase in liability awards has been due, in part, to the increase in the non-economic portion of these awards. Under the nebulous heading of "pain and suffering" damages, juries grant awards not necessarily related to objective loss criteria. They are permitted a degree of subjectivity in the highly emotional context of intoxication and "drunken driving," with potentially inflationary consequences.

The Committee, in attempting to determine how best to bring the dram shop liability system back to financial solvency and stability, first had to acknowledge that there is not unlimited compensation for every victim. There must out of necessity be a limit to the size of certain awards. In addressing this fact directly, the Committee determined that the most fair and least detrimental place to statutorily impose such limits, when the system itself has proven no longer capable of achieving these limits, is in the area of the awards for non-economic loss.

Economic losses are reasonably verifiable, whether they involve medical expenses or lost wages or other out-of-pocket costs. Non-economic losses are

significantly less verifiable, permitting limitation when a liability system has simply run out of available resources to satisfy a judgment. This is particularly true in the case of dram shop liability, which was originally and properly designed to be only a secondary source of recovery.

The imposition of a limit on non-economic damages is not intended to in any way minimize the importance the Committee places in the remedial purposes of the Dram Shop Act. It acknowledges instead the importance of having sufficient monies available in a liability system to insure that all innocent victims receive a fair share of compensation.

The Legislature clearly has the right to impose such limits. It must be kept in mind that dram shop liability is a purely legislatively-created right of recovery in Michigan. Common law does not recognize any negligence in the service of alcohol to an able-bodied person. Since all compensation paid to an injured person under the dram shop law is a statutorily created amount, the Legislature has the right to establish a reasonable basis for determining what compensation will be paid.

6. Retaining the Intoxicated Person as a Defendant

Recommendation

A. THE ALLEGED INTOXICATED PERSON MUST BE RETAINED AS A DEFENDANT IN ALL DRAM SHOP ACTIONS.

B. ANY PERSON WHO HAS NO CAUSE OF ACTION AGAINST THE INTOXICATED TORTFEASOR HAS NO CAUSE OF ACTION AGAINST THE LICENSEE.

Justification

This recommendation is merely a clarification and restoration of legislative intent. The Legislature mandated that no dram shop action may be brought unless the alleged intoxicated person -- the individual accused of committing the actual tort -- is named as a defendant and is retained until the conclusion of the action. By instituting this rule of law, the

Legislature precluded dependents of the tortfeasor from suing the licensee and thereby benefitting from the wrongful behavior of the person they are dependent upon.

Before 1979 a person at fault or his family could not sue under the act. Notwithstanding this legislative intent, the Michigan courts decided that the rule requiring that the alleged intoxicated person be retained as a defendant need not be observed if the family of the tortfeasor wanted to sue the licensee.

This decision should be corrected. It is a violation of the basic concept of dependency. The intoxicated person is the only tortfeasor when an accident occurs and should not be relieved of his or her responsibility for the wrongful action. By not properly carrying the responsibility of the intoxicated person forward to his dependents, the intoxicated person is fully relieved of responsibility for his or her own negligent actions. In fact, the intoxicated person may very well share the benefits of the award given to his family, which constitutes the sanctioning of negligent intoxication.

In order to retain the imposition of responsibility on the wrongful intoxicated person, especially in the context of comparative negligence and the allocation of fault, the intoxicated person must remain a necessary defendant in every dram shop action. His or her degree of fault must be determined, and those that benefit from his or her actions must not be permitted to have a cause of action against the licensee and thereby benefit from his or her wrongful actions.

7. Frivolous Actions

Recommendation

AUTHORIZE THE FULL RECOVERY OF COSTS AND REASONABLE ATTORNEY FEES INCURRED BY THE PREVAILING PARTY FROM THE OTHER PARTY, OR THEIR ATTORNEY IF THE COURT FINDS THAT A CIVIL ACTION OR DEFENSE WAS FRIVOLOUS OR SOLELY FOR HARASSMENT (SB 735 of 1984 and MCR 2.114 (E)).

## Justification

Many cases are filed against dram shop licensees merely because they are "collectible" or the "deep pocket." Others are filed on the basis of guesswork, where the plaintiff is uncertain how many and which bars or taverns the intoxicated person visited. Even if these cases are dismissed without a trial or settlement, the defendant must still pay the cost of legal defense, which may amount to many thousands of dollars per case. Many of these cases are unnecessarily settled, merely to avoid high defense costs.

While under present Michigan Court Rule, MCR 2.1141(E), there is a provision to assess reasonable expenses, including attorney fees, against a party who presents unwarranted allegations or defenses, the rule is rarely invoked. Currently there seems to be a perception that there is little to lose by filing a frivolous lawsuit since litigation costs are rarely, if ever, awarded. Testimony has revealed that a significant portion of the costs which have contributed to the crisis in dram shop liability are due to the rise in the filings of frivolous and/or harassing law suits. These suits must be stopped.

The Committee recommends a much more vigorous application of the frivolous suit provision awarding costs and attorney fees. Such a provision should be placed directly into the Dram Shop Act. This recommendation to statutorily authorize the payment of costs will encourage parties to oppose frivolous actions. In the past, they may have simply settled because it would cost more to litigate the case. Under an effective provision, they are more likely to stay the course.

A vigorously applied provision will deter frivolous and harassing legal actions. The possibility of being held liable for the other party's legal expenses will cause litigants to more carefully weigh the merits of the lawsuit or the defense before filing a pleading. The subsequent reduction in

litigation costs and unnecessary settlement costs should contribute substantially to the solvency of the dram shop liability system.

8. Mandatory Server Training Program

Recommendation

THE MICHIGAN LIQUOR CONTROL COMMISSION SHOULD ESTABLISH AN ALCOHOL SERVER TRAINING PROGRAM. EMPLOYEE PARTICIPATION IN THE PROGRAM SHOULD IN TIME BECOME MANDATORY FOR ISSUANCE OF THE ORIGINAL LICENSE AND FOR RELICENSURE.

Justification

The continuing societal problem of intoxication-caused automobile accidents, with more than 70 percent of automobile accident fatalities involving the drinking of alcohol, demonstrates that the preventive purposes of the dram shop law are not being achieved. More attention must be given to finding ways to prevent intoxication-caused accidents. The primary goal should not be to fully compensate the innocent victims of alcohol-related accidents. That is the secondary purpose of the law. The primary goal must be to prevent the accidents from happening in the first place.

The Committee believes that education and a better understanding of what causes intoxication and alcohol-related accidents is a potentially constructive factor in the pursuit of prevention. In order to achieve such education and understanding, the Michigan Liquor Control Commission should establish an alcohol server training program for the employees of licensed liquor establishments.

The Commission should be legislatively mandated to establish a server training board, with representation from the Commission, the Michigan Department of Public Health, the Attorney General, and the licensee community. This board should regulate the development of training courses and materials, trainee examination and examination procedures, certification procedures for

instructors, and enforcement procedures. Regional schools should be established to provide the training courses.

Licensee employees would then be required to learn about alcohol and the effects of intoxication. This could include education about alcohol as a drug and its effects on the body and behavior (especially driving ability), and the effects of alcohol's combination with commonly used drugs. Servers should be taught how to recognize the problem drinker. They should become familiar with the alcoholic beverage laws of Michigan, such as sale to minors and of course, the Dram Shop Act. Techniques of intervention with the problem customer, including ways to cut off service and protect the customer, and the provision of alternative means of transportation should be emphasized. The server should learn how to deal effectively with the belligerent customer. Employees might also be instructed on advertising and marketing for safe and responsible drinking patterns.

The Senate Committee recommends reference to the Model Alcoholic Beverage Retail Licensee Liability Act of 1985, prepared by the Prevention Research Group of the Medical Research Institute of San Francisco, and the included model for the establishment of alcohol server training programs.

After an appropriate time to develop and establish a server training program, participation in the program should become mandatory for all employees of licensees. Licenses should be granted or renewed by the Liquor Control Commission only upon the successful completion of the training program by employees. Manuals should be made available by the training board incorporating the information conveyed in the training program. Such education and training should contribute substantially to the prevention of intoxication-caused accidents.

## 9. Responsible Business Practices Defense

### Recommendation

A RESPONSIBLE BUSINESS PRACTICES DEFENSE SHOULD BE ESTABLISHED FOR LICENSEES THAT DEVELOP AND PRACTICE RESPONSIBLE MANAGEMENT POLICIES AND PROCEDURES DESIGNED TO REDUCE THE INCIDENCE OF NEGLIGENT INTOXICATION.

### Justification

The most effective programs designed to accomplish an objective are those that are voluntarily undertaken. In order to achieve the objective of preventing alcohol-related accidents, ways must be found to stimulate the voluntary pursuit of prevention by licensees. One potentially effective device for achieving such a voluntary pursuit is the establishment of a responsible business practice's defense.

Under such a defense, the defendant's service of alcoholic beverages would not be considered in violation of the law if the defendant, at the time of service, was adhering to responsible business practices designed to reduce the incidence of negligent intoxication. Such practices would include participation in mandatory server training programs, or in the absence of such mandatory programs, the establishment of internal training programs designed to develop knowledge and skills regarding responsible service of alcoholic beverages and the handling of intoxicated persons.

Evidence of responsible business practices could include, but not be limited to, encouragement of patrons not to become intoxicated, promoting the availability of non-alcoholic beverages and food, providing alternative means of transportation, prohibiting employees from consuming alcohol on the licensees' premises, and establishment of standardized methods for hiring qualified employees. Special emphasis should be placed on practices designed to detect minors and deter same for consuming alcohol, including systematic identification procedures.

If licensees are permitted to establish such a defense, they are likely to voluntarily begin responsible business practices in anticipation of future lawsuits and in order to avoid incidents which would lead to such lawsuits. With the voluntary cooperation of licensees in such prevention activities, the goal of reducing accidents should make great strides.

The Committee recommends reference to the Model Alcoholic Beverage Retail Licensee Liability Act of 1985, prepared by the Prevention Research Group of the Medical Research Institute of San Francisco, which presents a model responsible business practices defense in Section 10 of the model act.

## 10. Increased Relicensure Enforcement

### Recommendation

THE MICHIGAN LIQUOR CONTROL COMMISSION SHOULD DENY THE RELICENSURE OF LICENSEES ENGAGING IN MULTIPLE VIOLATIONS OF THE DRAM SHOP ACT.

### Justification

An essential component in the pursuit of prevention of alcohol-related accidents is the elimination of these persons who repeatedly contribute to the occurrence of such accidents. Licensees that repeatedly are found in violation of the Dram Shop Act should not be permitted to continue their irresponsible practices. The Michigan Liquor Control Commission should increase its enforcement activities by halting the relicensure of licensees that engage in repeated violations of the act.

Strict relicensure practices should contribute to a reduction in the overall liability of the alcoholic beverage sale and service industry and also contribute to the better business practices necessary to prevent negligent intoxication.

11. Rebuttable Last Licensee Presumption

Recommendation

ESTABLISH A REBUTTABLE PRESUMPTION THAT ONLY THE LAST LICENSED LIQUOR ESTABLISHMENT SERVING THE ALLEGED INTOXICATED PERSON IS LIABLE IN A DRAM SHOP ACTION.

Justification

Many persons that are involved in alcohol-related accidents patronize a number of licensee establishments in the course of an evening. Many engage in a "night on the town," becoming increasingly intoxicated as they go along. Logic would suggest that the primary responsibility for improper service of intoxicated persons would fall on the last licensee, where the alleged intoxicated person was most likely to appear "visibly intoxicated," as required to establish liability under the Dram Shop Act.

In practice, however, liability has not consistently rested on the last serving licensee. Plaintiffs are able to sue all of the licensed liquor establishments that the intoxicated tortfeasor visited. Liability has often come to rest on an earlier licensee, merely because that licensee was the "deep pocket," the establishment most able to pay a very large jury award.

In addition, licensees testified that many plaintiffs will name defendant establishments on the basis of guesswork, not knowing whether the intoxicated tortfeasor was a patron or not. Because of the great expense of defending a lawsuit and the risk of substantial jury-imposed liability, those bars and taverns that are named on the basis of guesswork or that were early servers in the chain of establishments patronized by the intoxicated tortfeasor are forced to incur very expensive settlements. This has contributed substantially and improperly to the high liability burden of licensees.

This cost-stimulating dilemma can be corrected by creating a rebuttable presumption that only the last licensee patronized by an alleged intoxicated person is liable for damages caused by that person. If facts exist to show

wrongful behavior by previous licensees, the presumption is no longer in effect. However, in the absence of actual proof to the contrary, the liability under dram shop will rest only on the last licensee, where intoxication was last increased.

12. Increased Penalties for Service to Minors and False Identification

Recommendation

A. INCREASE THE PENALTY ON LICENSEES THAT SERVE MINORS.

B. INCREASE THE PENALTY ON MINORS THAT PRESENT FALSE IDENTIFICATION.

Justification

A significant portion of the accidents caused by intoxication are caused by minors who have purchased alcohol from or been served alcohol by licensees. Many of these accidents could be prevented with the institution of more effective business practices designed to detect which patrons are minors and avoid sale or service of alcohol to them.

In order to encourage the development of more effective business practices and discourage attempts to circumvent these practices, penalties should be increase both for the service of alcohol to minors by licensees and the presentation of false identification to licensees by minors.

Section 20(1) of the Michigan Liquor Control Act permits the Liquor Control Commission to assess a penalty of $300 for licensee violations of the act, including service to minors. This penalty amount should be increased to $2,000 in order to encourage better business practices aimed at avoiding service to minors.

Section 319 of the Michigan Vehicle Code permits the Secretary of State to suspend the drivers' licenses of persons upon the committing of certain violations. Section 33b(4) of the Michigan Liquor Control Act makes it a misdemeanor for a person less than 21 years of age to use fraudulent

identification to purchase alcoholic liquor. A person who violates section 33b(4) of the Liquor Control Act should also be subject to the penalties of section 319 of the Vehicle Code. The Secretary of State should suspend the drivers' licenses of all violators who show false identification. The Committee suggests a suspension of 30 days upon the first offense, 60 days upon the second offense, and 90 days for a third or subsequent offenses.

13. Self-Insurance

Recommendation

A. THE STATE SHOULD ENCOURAGE AND ADMINISTRATIVELY FACILITATE THE ESTABLISHMENT OF SELF-INSURANCE PROGRAMS FOR LICENSEES.

B. MICHIGAN LAW SHOULD BE AMENDED TO PERMIT LICENSEE ASSOCIATIONS TO ESTABLISH GROUP SELF-INSURANCE PROGRAMS FOR THEIR MEMBERSHIP.

Justification

The current liability insurance dilemma faced by Michigan's alcoholic beverage licensees, with as many as 65 percent operating without liability insurance protection, is unacceptable. This condition not only places the licensees at an unreasonable risk, but also threatens the innocent victims of alcohol-related accidents with an absence of any sources of recovery. The Committee considered responding to this crisis by recommending a program of mandatory insurance, but concluded that this would not assure availability of insurance and might make the financial condition of many licensees even more tenuous.

Nevertheless, the Committee believes that certain steps can be taken to facilitate broader liability risk protections for licensees. Organized programs of self-insurance should be encouraged by the state through the development of information programs. The state might also consider supplying an administrative mechanism for the operation of self-insurance programs. Such a system could be tailored on many of the structural aspect of Michigan's

workers' disability compensation self-insurance system, including provisions for reinsurance (where the employer accepts liability for losses up to a certain amount, and enters into a contract with an insurance company for liability in access of that amount) and establishment of a self-insurers security fund to pay benefits (in the case of dram shop liability) when a liability judgment threatens the licensee with insolvency. Such a system of self-insurance would not be mandatory. It would be provided as an informational and organizational tool.

In addition to state encouragement and facilitation of individual self-insurance programs, the law should be changed to permit group self-insurance. Licensee organizations should be permitted to establish insurance programs for their membership, operated and financed under auspices of the organization. A recent amendment to Michigan's workers' disability compensation statute allows employers in a single industry to join together to provide self-insurance, and this might provide a starting model for the alcoholic beverages industry.

Such facilitation of self-insurance would both help protect the solvency of licensees, and insure that the compensation purposes of the Dram Shop Act are protected and preserved.

Senator Engler offered the following resolution:

Senate Resolution No. 204.

A resolution creating a Senate Select Committee on Civil Justice Reform.

Whereas, The State of Michigan is experiencing a crisis in civil litigation, with an unprecedented number of cases jamming our court system; and

Whereas, This explosion in the number of cases before our courts, many of which result in expensive damage awards, precludes any attempt at fair, swift, and efficient administration of justice. Additionally, this situation is detrimental to our state's business climate and has led to the unavailability of insurance or skyrocketing premiums in numerous instances and the loss of job opportunities; and

Whereas, There exists an immediate and urgent need to remedy this situation. All aspects of the court system and court procedures must be studied, including the especially critical areas of medical malpractice, government immunity and dramshop liability as well as the various statutes which may have contributed to this civil justice crisis; now, therefore, be it

Resolved by the Senate, That there be created a Senate Select Committee on Civil Justice Reform to consist of seven members of the Senate, to be appointed in the same manner as standing committees are appointed, to function until October 15, 1985, to study civil justice in Michigan. The select committee shall report its findings and recommendations in writing to the Senate by October 15, 1985; and be it further

Resolved, That the committee shall address, at a minimum, the issues of structured settlements, statutes of limitation, prejudgment interest, joint and several liability, caps on non-economic damages, and the collateral source rule; and be it further

Resolved, That the committee shall be staffed by the Senate Majority Counsel Office and other Senate staff members as deemed necessary; and be it further

Resolved, That the committee may call upon the Legislative Service Bureau, subject to the approval of the Legislative Council, for such services and assistance as it deems necessary; and be it further

Resolved, That the members of the committee shall serve without compensation, but shall be entitled to actual and necessary travel and other expenses incurred in the performance of official duties, the expenses of the members of the Senate to be paid, subject to the approval procedures of the Senate, from the appropriations to the Senate.

## Appendix B

### Public Hearings

| Date | City | Hearing |
|---|---|---|
| July 23, 1985 | Lansing | Civil Justice Reform |
| July 25, 1985 | Traverse City | Medical Malpractice |
| July 26, 1985 | Marquette | Medical Malpractice |
| July 31, 1985 | Lansing | Governmental Immunity |
| August 13, 1985 | Lansing | Governmental Immunity |
| August 16, 1985 | Bay City | Dram Shop Reform |
| August 21, 1985 | Lansing | Civil Justice Reform |
| August 26, 1985 | Muskegon | Medical Malpractice |
| August 27, 1985 | Pontiac | Medical Malpractice |
| August 28, 1985 | Lansing | Civil Justice Reform |
| September 9, 1985 | Pontiac | Dram Shop Reform |
| September 11, 1985 | Lansing | Civil Justice Reform |
| September 16, 1985 | Saginaw | Medical Malpractice |
| September 16, 1985 | Adrian | Medical Malpractice |